

# The UN's Global Compact for Safe, Orderly and Regular Migration

Analysis of the final draft, Objective by Objective

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## **GLOBAL COMPACT FOR MIGRATION**

The New York Declaration on Refugees and Migrants, adopted by the United Nations General Assembly on 19 September 2016, initiated a process towards two Compacts: the Global Compact for Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM). The Compacts are non-binding agreements which lay out a set of principles, objectives and partnerships for the governance of refugees and migration. This commentary focuses on the Global Compact on Migration, the first intergovernmental agreement on migration, negotiated under the auspices of the United Nations.

Every objective of the Global Compact for Migration is examined in view of human rights obligations and state practices. The contributors provide for each of the GCM's objectives a critical assessment, highlight significant changes during the negotiations, and underline future aspirations. The commentaries seek to provide scholars, practitioners and policy-makers alike with accessible substantive analyses in the lead up to the adoption of the Global Compact for Migration at the end of 2018.

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# Introduction

*Professor Elspeth Guild (QMUL) and Dr Tugba Basaran (University of Cambridge)*

*This document analyses the final draft (objective by objective) of the UN's Global Compact for Safe, Orderly and Regular Migration. The original blog posts can be found at [rli.blogs.sas.ac.uk](http://rli.blogs.sas.ac.uk) and French translations are available on the Plateforme Nationale Protection Migrants (PNPM) website: [www.pnpm.ma](http://www.pnpm.ma)*

New York Declaration on Refugees and Migrants, adopted by the United Nations General Assembly on 19 September 2016, initiated a process towards two Compacts: the Global Compact for Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM). The Compacts are non-binding cooperative frameworks which lay out a set of principles, objectives and partnerships for the governance of refugees and migration. This commentary will focus on the Global Compact on Migration, the first intergovernmental cooperative framework on migration, negotiated under the auspices of the United Nations.

We shared, together with a number of academics and practitioners, some initial thoughts on the Zero Draft of the Global Compact for Migration (5 February 2018) in a provisional document entitled "First Perspectives on the Zero Draft" February 2018. Since then the Zero Draft has been modified a number of times during the intergovernmental negotiations (Zero Draft Plus on 5 March 2018, Revision 1 on 26 March 2018, Revision 2 on 28 May 2018, Revision 3 on 29 June 2018, and the resulting Final Draft on 11 July 2018).

In this commentary, we will provide a detailed analysis of the final document, the "Intergovernmentally negotiated and agreed outcome of the Global Compact for Safe, Orderly and Regular Migration" (13 July 2018), submitted for adoption to the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration (to be held on 10 – 11 December 2018 in Marrakech, Morocco). Every objective of the Global Compact for Migration will be examined in view of human rights obligations and state practices. The contributors will provide for each of the GCM's objectives a critical assessment, highlight significant changes during the negotiations, and underline future aspirations.

The commentaries seek to provide scholars, practitioners and policy-makers alike with accessible substantive analyses in the lead up to the adoption of the Global Compact for Migration at the end of 2018. This is particularly significant given the politically charged withdrawals of support from the GCM, namely the USA in December 2017 and Hungary in July 2018. The commentaries will be posted on this blog over the course of the next weeks, objective by objective.

## The Global Compact for Safe, Orderly and Regular Migration

### *Objectives*

1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin
3. Provide accurate and timely information at all stages of migration
4. Ensure that all migrants have proof of legal identity and adequate documentation
5. Enhance availability and flexibility of pathways for regular migration
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work
7. Address and reduce vulnerabilities in migration
8. Save lives and establish coordinated international efforts on missing migrants
9. Strengthen the transnational response to smuggling of migrants
10. Prevent, combat and eradicate trafficking in persons in the context of international migration
11. Manage borders in an integrated, secure and coordinated manner
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral
13. Use migration detention only as a measure of last resort and work towards alternatives
14. Enhance consular protection, assistance and cooperation throughout the migration cycle
15. Provide access to basic services for migrants
16. Empower migrants and societies to realize full inclusion and social cohesion

17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration
18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences
19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration
22. Establish mechanisms for the portability of social security entitlements and earned benefits
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration

# Objective 1: Collect and utilize accurate and disaggregated data as a basis for evidence-based policies

Professor Elspeth Guild, (QMUL)

Article 17 International Covenant on Civil and Political Rights (ICCPR):

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

Article 26 ICCPR: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

## Introduction

The New York Declaration which called for the negotiation of two Compacts, one on migrants the other on refugees, stated clearly and unambiguously that the Compacts must reflect and enhance the existing state of international human rights law. This commitment is faithfully carried forward into the final draft of the GCM in the section Unity of Purpose, Paragraph 15: "The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination... We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families."

In this commentary I will examine the content of Objective 1 (Paragraph 17): to collect and utilize accurate and disaggregated data as a basis for evidence-based policy making. I will start by describing the scope and content of the commitment in the final draft of 11 July 2018. In doing so I will highlight the few changes which have been introduced since the previous draft of 28 May 2018. Then I will examine where UN human rights obligations require particular attention in the implementation of the Objective.

## The Scope and Content

This commitment is to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable, comparable data, disaggregated by sex, age, migration status and other characteristics relevant in national contexts. The reference to national contexts is a new addition since the draft of 28 May. The commitment is to be realized while upholding the right to privacy under international human rights law and protecting personal data. The express reference to the right to privacy is most welcome. This clearly engages Article 17 ICCPR (above) in all actions to implement the objective. However, it would have also been helpful to include an express reference to Article 26 ICCPR particularly to clarify the scope open to states in the disaggregation of data on the basis of other characteristics *relevant in national contexts* (emphasis provided). The concern here is that the reference to "national contexts" must never be instrumentalised to purport to justify the collection of sensitive personal data (race, ethnicity, religion etc.) about migrants for purposes contrary to Article 26 ICCPR.

There are too many appalling examples in recent history of persecution of ethnic and religious minorities by states which justify their actions on the basis that the minorities are actually migrants who should not be in the country at all (e.g. Rwanda 1994, successor states of the former Yugoslavia 1994, Myanmar 2017). "National context" in the GCM must never be used to justify the extraction of data for the purpose of collective expulsion.

The Objective commits states to use data collected for research, and to guide evidence-based policy-making and well-informed public discourse. It is also aims to allow effective monitoring and evaluation of the implementation of commitments over time. In order to realize the commitment, the Objective sets out nine actions from which states may draw. These are:

- A comprehensive strategy to improve migration data at local, national, regional and global levels in accordance with the UN Statistical Commission.
- Improve international comparability of migration statistics applying common definitions;
- Build national capacities for data collection, address gaps and assess key migration trends;
- Use data on the effects and benefits of migration and contributions of migrants and diasporas;
- Support collaboration between global and regional databases and depositories;

- Support regional centres of research and training on migration to maximize the value of disaggregated data;
- Improve national data collection by integrating migration related questions in national censuses;
- Conduct household, labour force and other surveys to collect information on the social and economic integration of migrants;
- Enhance collaboration between state bodies responsible for migration data including border records, visas, residence permits, population registries and other relevant sources;
- Develop country specific migration profiles;
- Research the interrelationship between migration and the three dimensions of sustainable development.

All of these actions are capable of aiding the objective of upholding and delivering all the human rights to migrants to which they are entitled. However, a number of them are ambiguous and depending on their implementation, could give rise to the opposite – the violation of migrants' human rights.

## The Future

The dangers which need to be avoided are as follows:

- Engaging all levels of governance, local, national and regional in migration data collection may create or re-enforce migration status as a defining characteristic of individuals in access to goods and services. This may have the effect of diminishing access for migrants to basic services which the GCM commits to ensuring in Objective 15. Allowing migration status to be a defining characteristic of any population may give rise to discrimination inconsistent with Article 26 ICCPR.
- The use of data regarding migrants' contributions to states is similarly ambiguous. The idea that migrants must justify their presence in their host state on the basis of their contribution to it is problematic. While an argument could be made that it is relevant to the admission (only, not residence and stay once they are already contributing to the society in taxes etc.) of migrant workers, this is not the case for other migrants, such as family members, refugees, students etc. Depending on how implemented, it may offend against the human right to non-discrimination in the guarantee of other human rights. All members of a society, whether migrants or citizens (bearing in mind that many migrants will be, in the phrase of Motomura, citizens-in-waiting, people who will probably become citizens sooner or later) are entitled to equality of treatment. Any differences in treatment must be justified on grounds which are consistent with Article 26 ICCPR. The idea that migrants should somehow be better than citizens, more diligent, hardworking, educated etc. gives the impression that the entitlement to equality does not apply to them which is wrong in international human rights law.
- Collaboration among databases internationally can be very useful to get a better picture of migration. But it must not be used to get a better picture of migrants as this is contrary to their individual right to privacy (Article 17 ICCPR). One of the more insidious developments among some states is the introduction of interoperability among their national and regional databases with information on migrants. This makes it possible for state officials to search multiple databases around the world not just in respect of a specific individual but on the basis of profiles. Privacy, which includes personal data, is protected in international human rights law. Any state interference is an exception to the right to privacy and must be justified on limited grounds set out in law. The call of the GCM for collaboration among databases needs to be implemented in a manner whereby that collaboration is limited to migration only and excludes data-sharing on individual migrants themselves.
- Including migration related questions in censuses and the conduct of surveys on migrants' social and economic integration can similarly be a double edged sword. The amount of detailed information which the GMC recommends to be collected in censuses is surprising. Detail about birthplaces of grandparents seems rather remote and it is not clear what objective and justified interest is achieved through the collection of such data. Should such data be used to implement legislation which makes distinctions in immigration status on the basis of the place of origin of grandparents it would be difficult to defend such legislation against challenges on the basis of arbitrary discrimination. Likewise, the definition of social and economic integration is rather ambiguous. As has been seen in a number of European states such as the Netherlands, the concept of social integration of migrants has been used to introduce ever more difficult 'integration' tests for migrants



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even after they acquire permanent residence. The consequences of failing the tests are precariousness of residence and work rights and the withdrawal of social benefits. This concept and application of social integration hurts migrants and their families. It can be inconsistent with the human right to dignity.

- Collaboration among state bodies responsible for aspects of migration such as border records, visas etc. obviously runs the risk of violating the right to privacy of individual migrants. Implementation must be carefully monitored to ensure that all data is anonymized in a manner where that anonymization cannot be reversed when the data is shared across bodies.
- Migration profiles are not without ambiguity. Some international organizations have developed profiles for countries which seek to indicate whether the citizens of that country “are likely” to migrate (regularly or irregularly). Yet, there are substantial issues about such profiles and their reliability. The effect can be to stigmatize nationals of some countries on the basis of the migration patterns of some of their co-citizens. It is this aspect of the US Travel Bans introduced against selected countries in 2017–18 which has been most contentious in the international community. It is a form of collective punishment of all citizens on the basis of the actions of some of their co-citizens.

Research on migration and sustainable development is an excellent objective which raises few problems about human rights compliance.

Objective 1 of the GCM has remained fairly stable during the negotiations. Some additions have been made, in particular there is greater emphasis on the protection and championing of human rights. The end result provides real opportunities to improve evidence-based policy-making which is an excellent objective in this field. However, states must take great care in implementation of this Objective that it does not become a justification for the arbitrary interference with the personal data of migrants or prohibited discrimination against individual migrants. Similarly, it must not become a tool to identify and persecute people on the basis of their migratory status or background.

All states, but particularly those with a history of persecution of their ethnic minorities (in particular where coupled with stigmatization of those minorities as ‘migrants’), need to monitor the actions of their bodies and agencies with anxious scrutiny to ensure that implementation of the GCM is not abused to justify open season on migrants’ personal data notwithstanding the human rights obligation to protect privacy and to eliminate discrimination.

## Objective 2: Minimize the adverse drivers and structural factors that compel people to leave their country of origin

Nicolette Busuttil (QMUL)

**International Covenant on Economic, Social and Cultural Rights, article 11(1):** *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

**International Covenant on Civil and Political Rights, article 12(2):** *Everyone shall be free to leave any country, including his own.*

### Introduction

Objective 2 of the Global Compact for Safe, Orderly and Regular Migration (GCM), builds on States' commitment in the New York Declaration to address those migration drivers and structural factors which create or exacerbate large movements of people. The stated focus is on minimising irregular migration, with the drivers referred to as 'adverse', given their propensity to propel individuals and communities to leave their countries of origin out of necessity rather than choice. The New York Declaration articulated how underdevelopment fuels desperation and deteriorating environments, including through turbulent political, socioeconomic and environmental conditions, which compel people to move in order to survive. These situations, where individuals are driven to move because their livelihood depends on it, are acknowledged in both instruments as undesirable.

Hence, Objective 2 specifies twelve actions which States are to draw from to realise their commitment to addressing and minimising these adverse migration drivers and structural factors. The twelve actions are categorised into two sets, with seven actions explicitly addressing underdevelopment, focusing on the importance of sustainable development. Broadly speaking, these focus on: the need to promote development initiatives and agreements; invest in programmes which deliver on the commitments therein; develop mechanisms which monitor and anticipate risks or threats that contribute to migration movements; invest in sustainable development and human capital development; strengthen collaboration between humanitarian and development actors; and, account for migrants in national emergency responses. The remaining five actions deal exclusively with action to be taken by States in respect of natural disasters, the adverse effects of climate change and environmental degradation, so as to minimise the disruptive effect these events pose to individuals' lives. They call on States to strengthen joint analysis and information-sharing, develop adaptation and resilience strategies to environmental change, integrate displacement considerations when preparing for disaster responses, develop approaches to address the vulnerabilities of those affected by disasters, and to address migration movements in the context of natural disasters.

### Comparison and significant changes

Throughout the course of negotiations, the text of Objective 2 was not subject to the controversy reserved for other parts of the GCM, resulting in a Final Draft with limited changes from the proposed wording in the Zero Draft, beyond the reordering and classification of paragraphs. In this post, I refer to the more significant of these changes in addition to the somewhat problematic understanding of migration drivers which seemingly informs the text in Objective 2 and begs the question as to whether the lofty aspirations identified therein are likely to remain at the level of rhetorical flourish.

The changes that have been made serve to further embed the GCM within the framework of other international instruments meant to address development and environmental issues. Notable among these is the inclusion of the reference to the 2030 Agenda for Sustainable Development in the chapeau to Paragraph 18, with States committing to ensuring its 'timely and full implementation'. Whilst the importance of promoting the operationalisation of the 2030 Agenda had already been noted in the Zero Draft, its full implementation now becomes a commitment framing the rest of the actions under Objective 2. In so doing, the GCM makes explicit the role played by socioeconomic and environmental conditions in shaping migrants' decisions to leave their countries, further highlighting how the success and impact of the GCM to facilitate safe, orderly and regular migration is dependent on the fulfilment of commitments already made by the international community.

In addition to the 2030 Agenda, the commitment to refer to and implement existing frameworks, specifically the Addis Ababa Action Agenda relating to financing for development, the Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change and its follow-up, the Platform on Disaster Displacement, the Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster (MCIC Guidelines), the Paris Agreement and the Sendai Framework for Disaster Risk Reduction 2015–2030, anchors the GCM

within existing initiatives at international level. This goes a long way towards illustrating that, in addition to its non-binding nature, States are not incurring new obligations in the GCM but consolidating their existing ones, thereby belying the political arguments currently employed to dissuade States from adopting it. In fact, despite a number of States' fearmongering about a perceived imposition of additional obligations, more than being a migrants' charter of rights, the GCM clearly illustrates that 'states' interests are also front and centre'.

## Underdevelopment as an adverse driver of migration

It could be argued that a key change has been a softening of the language in Objective 2. States are now only enjoined to 'draw from' the actions identified in Paragraph 18, these being the same actions which were initially considered 'instrumental' in realising the commitment to make migration a choice and not a necessity. However, this is offset by the change to the paragraph dealing with the investment in programmes to implement the Sustainable Development Goals. Initially, the foreseen investment had as its aim the minimisation of adverse and structural drivers of migration, whereas it now calls for their elimination altogether. Moreover, the desired programmes initially called for 'poverty alleviation' whereas they now call for 'poverty elimination', recognise the importance of 'inclusive economic growth' and expressly mention the role of food security, health and sanitation unlike previous iterations. The added reference to gender equality and the empowerment of women and girls is welcome. Given the feminisation of poverty and the pervasiveness of gender inequality it is in line with the commitment to 'reach the furthest behind first' (para 18(a)).

This being said, a glaring omission in the GCM is the absence of a definition as to what is meant by the 'adverse drivers and structural factors' to be addressed through Objective 2, terms which have generated considerable debate in scholarly works (see, for example, Carling & Collins 2018). The closest the GCM comes to identifying what it seeks to address is by inference, as when it provides an inclusive list of programmes which would go a long way towards meeting States' SDG commitments. These initiatives would include those focused on

poverty eradication, food security, health and sanitation, education, inclusive economic growth, infrastructure, urban and rural development, employment creation, decent work, gender equality and empowerment of women and girls, resilience and disaster risk reduction, climate change mitigation and adaptation, addressing the socioeconomic effects of all forms of violence, nondiscrimination, rule of law and good governance, access to justice and protection of human rights (para 18(b)).

The wording used clarifies the role played by underdevelopment and human rights violations in forcing people to leave their countries by indicating that they are among the 'adverse drivers and structural factors' which instigate mass movement. As has been noted elsewhere, a more robust identification of these adverse drivers and structural factors would have been welcome, as would the clearer outlining of the relationship between migration and development. The absence of a definition stands in contrast to the New York Declaration which acknowledged the multiple and often compound reasons why people move, specifying 'poverty, underdevelopment, lack of opportunities, poor governance and environmental factors' as drivers of migration and the role played by human rights violations in international migration (Annex II para 7).

However, it is here that the logic of increasing development to reduce migration needs to be interrogated. Objective 2 is seemingly based on the assumption that more conducive political, economic, social and environmental conditions would enable people to lead peaceful, productive and sustainable lives in their own country, thereby resulting in less migration. Whilst development and the respect, promotion and fulfilment of rights are certainly laudable aspirations for States to work towards, and which will significantly improve the lives of many, a conclusion that improved conditions will reduce migration is not borne out by the evidence. Development has been shown to lead to higher levels of emigration, at least in the short- to medium-term. Flahaux and De Haas have analysed African migration to point out just how "development" in poor countries ... [is]... generally associated to increasing rather than decreasing levels of mobility and migration". Indeed, conceiving of development and migration in a linear push-pull manner, where underdevelopment fuels migration and development minimises it, tends to overlook the humanity of the migrant, as a person with unique hopes, fears and dreams which can include 'aspirations' to migrate for reasons going beyond improving one's socioeconomic conditions. Of course, in line with de Haas' 'aspirations-capabilities framework' the realisation of these aspirations work in tandem with the capability to do so, with this including sufficient income, given that the migratory process tends to be a financially costly one.

Aspirations are alluded to in Objective 2, with the inclusion in Paragraph 18's chapeau of a commitment that conditions are put in place for people 'to fulfil their personal aspirations'. Additionally, Objective 2 purportedly seeks the minimisation of 'irregular migration' and not all migration. Nonetheless, in the absence of an articulation of what is meant by 'irregular migration' for the purposes of the GCM, despite calls throughout negotiations to do so, the tenor of the actions outlined in paragraph 18 point towards a desire to reduce migration in general. For example, as has been noted elsewhere, in contrast to the opening statement acknowledging how migration can bring benefits to all, Objective 2's focus is on tackling drivers of migration exclusively in poor countries. The 'root causes' approach advocated for in the New York Declaration (para 30) problematises migration as a phenomenon to be stemmed rather than recognising the opportunities it can bring. Thus, in paragraph 18(d), we see a change from States being called to invest in sustainable development so people can improve their lives and meet their aspirations to an action to create 'conducive conditions that allow communities and individuals to take advantage of opportunities in their own countries'.

## Environmental drivers of migration

As Aleinikoff and Martin have noted, the GCM is ground-breaking for its explicit reference to environmental drivers of migration. It represents a collective effort by States to address the plight of some of those whose lives are uprooted for reasons outside of the international refugee protection regime and for whom there is no immediate prospect of return.

It is pertinent to note the change in paragraph 18(h), which now incorporates a human rights dimension in strengthening joint analysis and sharing of information in the context of understanding and planning for climate change-related migration. States are called to ensure the 'effective respect, protection and fulfilment of the human rights of all migrants'. A further welcome change introduced in the latter stages of negotiation is the reference to ensuring respect for rights in the delivery of humanitarian assistance provided to those affected by sudden-onset and slow-onset natural disasters.

Yet, despite the inclusion of environmental drivers and their articulation in rights language, States' preoccupation with containment within national borders is also best exemplified by this set of actions. The actions outlined in Objective 2 stop short of specifying the long-term prospects for those migrants forced to move because of environmental issues. There is no *non-refoulement* prohibition which precludes their return to the places they fled from. Instead, we see how the initial action calling for the 'development of tailored migration schemes ... including planned temporary and permanent relocation to facilitate migration as an adaptation strategy' (Zero Draft, para 15(j)) is supplanted by the action to develop adaptation and resilience strategies which omit any reference to relocation and instead set out that 'adaptation in the country of origin is a priority' (Final Draft, para 15(i)).

This emphasis on adaptation in the country of origin is exceptionally jarring, as it follows a list of some of the changing realities people are forced to face including 'desertification, land degradation, drought and sea level rise'. It is not far-fetched to contemplate how these situations could give rise to abysmal living conditions which could constitute rights violations for those involved insofar as they preclude the ability to live a life in dignity. It is paragraph 21(g) under Objective 5 which provides a means through which those affected by 'sudden-onset natural disasters and other precarious situations' may find a pathway to move while return to their country is not possible. Nonetheless, as has been noted earlier on in this series, those provisions which initially guaranteed migrants' rights with a view to establishing safe, legal pathways for migration have disappeared from the final text or become intentionally vague.

In this context, the GCM's focus on containment is made evident, with the suggested change during negotiations to 'use practical migration measures' when adaptation in country of origin is not feasible considered as not going far enough, leading to the final version with its recognition of adaptation in the country of origin as a priority. Additionally, given that the vast majority of migrants displaced by environmental phenomena remain within national borders, the GCM's omission to refer to internal movements arising from environmental conditions is also of concern.

In this light, the absence of any reference to the human right to leave one's country assumes greater relevance. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both specify the right of the individual to leave any country, including her own. Yet, the lack of any explicit reference to the right and the use of language in Objective 2 which prioritises non-movement, paints a grim picture where individual rights are sacrificed at the altar of migration control.

## The future

In conclusion, there is much to welcome in the GCM's attempt to improve socioeconomic conditions for individuals and communities and to better prepare for the devastating effects of climate change and other environmental degradation. However, in evaluating the potential success of the GCM's objectives, it might be worth to pay heed to Audre Lorde's words referencing the multidimensional aspects of human existence. Her observation that '*[t]here is no such thing as a single-issue struggle, because we do not live single-issue lives*' resonates with those for whom the drive to migrate is not reducible to a single factor or factors limited to improved socio-economic conditions.

Thus, in the context of both development and environmental change, the success of Objective 2 to make migration a choice rather than a necessity is beholden to States fulfilling it in the spirit of the principle of shared responsibility outlined in its vision and guiding principles, whilst respecting the migrant's individual rights in line with their humanity.

## Objective 3: Provide accurate and timely information at all stages of migration

*Katharine T. Weatherhead (QMUL)*

International Covenant on Civil and Political Rights, 1966, art 19(2): *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

### Introduction

What began as a modest topic in the UN General Assembly's New York Declaration for Refugees and Migrants is now a fully fledged objective in the intergovernmentally negotiated Global Compact for Safe, Orderly and Regular Migration (GCM). In the New York Declaration of 19 September 2016, States commit to 'take measures to inform migrants about the various processes relating to their arrival and stay in countries of transit, destination and return' (A/RES/71/1, para 42). Objective 3 of the Final Draft of the GCM, dated 11 July 2018, pushes the New York Declaration forward. In Objective 3 (para 19), States commit to strengthening their efforts to provide information 'for and between States, communities and migrants at all stages of migration'. Broad in content, the information is to cover 'migration-related aspects' and it is to be 'accurate, timely, accessible and transparent'. An additional strand of commitment is that States 'use this information to develop migration policies that provide a high degree of predictability and certainty for all actors involved'.

The GCM lists five key actions to realise Objective 3, which can be summarised as follows: (a) launch a national website on regular migration options; (b) promote cooperation and dialogue on information exchange about migration-related trends; (c) create information points along migration routes; (d) provide arrivals with information on rights and obligations; and (e) promote information campaigns and awareness-raising.

In the following commentary, I highlight a few of the changes that States made to the text of Objective 3 before it reached the Final Draft. I go on to consider the promise that the Objective holds for the future, as well as some challenges that might impact the realisation of its potential.

### The Evolution

During the GCM's negotiation, Objective 3 underwent several changes. To start, the Objective's title originally addressed the provision of 'adequate' information, which was modified to 'accurate' information in Revision 3. The change clarifies a standard against which information is to be assessed; less vague than adequacy, the concept of accuracy points to truthfulness or correctness. The language chimes with existing international instruments. For instance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) directs States to take measures against the dissemination of 'misleading' information (art 68(1)(a)) and in the International Labour Organisation Migration for Employment Convention No.97 (Revised, 1949) Members undertake to provide migrants with 'accurate' information (art 2). The final wording thus strengthens the basis to work towards the dissemination of information in good faith.

Action (a) prompts the launch of 'a centralized and publicly accessible national website to make information available on regular migration options'. The national websites are to include elements such as immigration laws, visa applications, qualification requirements, training opportunities, and living costs and conditions. The procedural elements in the illustrative list of website content were expanded across the revisions, with the insertion of topics like fees and credential assessment. In contrast, socio-economic aspects of regular migration options were selectively retained. Though there is still reference to training and study opportunities, reference to employment opportunities was removed in Revision 2. Meanwhile, reference to living costs and conditions remains in the Final Draft. This selective mix of procedural and socio-economic content may mean that the national websites exhibit an incongruence of purpose that could limit people's use of them.

Action (b) on the promotion of cooperation and dialogue in information exchange evolved to incorporate certain legal safeguards. In Revision 2, a phrase was inserted which qualifies that the action will be implemented 'while upholding privacy rights and protecting personal data'. The insertion of privacy rights and data protection brings those areas of law implicated in information dissemination to the foreground and underlines State commitments to implement Objective 3 in line with their data-related obligations.

Action (c) on the establishment of information points along migratory routes underwent continuous revision. Initially termed 'information centres', Revision 2 refashioned them as 'information points'. The latter term connotes greater flexibility, and therefore adaptability, in their set-up, which is appropriate given that migratory routes change. States are to make available a range of information at these points, 'including on human rights and fundamental freedoms, appropriate protection and assistance, options and pathways for regular migration, and possibilities for return'. The



main modification to the list of information was around protection. The Zero Draft referred to international protection and asylum procedures, which in Revision 1 was reduced to international protection only, and then in Revision 2 was written more verbosely as 'access to international or humanitarian protection and assistance'. Finally, it was widened to 'appropriate protection and assistance' in Revision 3. While the ultimate wording could weaken any appreciation of the inescapable connection between migration and refugee protection, it is also more inclusive. The wording leaves room for the variety of protection that exists for migrants, including but not limited to refugee status in States parties to the Convention relating to the Status of Refugees (1951).

The provision of information to migrants on their rights and obligations in action (d) became both more and less demanding during the negotiations. On the one hand, the description of information as 'targeted, accessible and comprehensive' in the Zero Draft was elaborated to include gender-responsive and child-sensitive, added in Revisions 2 and 3 respectively. On the other hand, the demands of the action were reduced through the removal in Revision 2 of a motion to establish in-person and online counselling centres (though referral to counselling remains covered in action (c)). The additions make the information itself more specific to the recipients, while the removal eases implementation by the providers.

To finish, there was continuous amendment of action (e) on information campaigns. The envisaged information campaigns soon became not only multi-lingual (Zero Draft) but also gender-responsive and evidence-based (Revision 1). Back and forth occurred around the purpose of the campaigns. The Zero Draft articulated their purpose as 'to inform potential migrants about the challenges and opportunities of migration, including on the risks and dangers involved in irregular migration carried out through traffickers and smugglers'. Revision 2 then stated broadly that the purpose is rather 'to promote safe, orderly and regular migration, as well as to reduce the incidence of irregular migration'. In a midway position, Revision 3 settled on the purpose as 'to promote safe, orderly and regular migration, as well as to highlight the risks associated with irregular and unsafe migration'. The reduction of references to risks, dangers, trafficking, and smuggling means that the text is less heavily oriented towards limiting irregular migration. There is accordingly more scope to attend to regular migratory trajectories.

## The Future

The promise of Objective 3 lies in its potential to enhance processes of learning which can contribute to safe, orderly and regular migration. The promulgation and transparency of laws, along with associated policies and procedures, helps to bring them to the attention of States, communities, and migrants. Such an awareness supports people to act with regard for the legal framework and to use the resources available during migration. Towards this end, the recognition that information is not equally accessible to or relevant for all – communicated in the specifications that information should be child-sensitive, gender-responsive, in an understood language, and provided at all stages of migration – expands the objective's prospective beneficiaries. For example, though it is not made explicit, the objective's scope covers migrants in detention, who are mentioned in the UN Secretary General's report on 'Making migration work for all' as frequently not having access to information (A/72/643, para 44).

Furthermore, a public awareness of migration frameworks and associated trends enables critical reflection on the fitness of those frameworks in developing the certainty and predictability that Objective 3 seeks. After all, information can only facilitate safe, orderly and regular migration to the extent that the systems themselves are designed to achieve such migration. The design must include rules and procedures for entry, stay, and expulsion which are sufficiently clear for migrants to be able to form expectations about the possibilities for, and consequences of, action and to act accordingly. A minimisation of the discretion afforded to authorities when they implement the rules would contribute to such foreseeability. Yet, States must be careful not to amend migration frameworks disruptively. Frequent and erratic changes to the content of migration-related laws not only diminish the accuracy of information in circulation but also impede certainty and predictability. In particular, rule changes which transform groups of people from regular to irregular status, or move them from settled to precarious politico-legal trajectories, work against migrants' reasonable expectations and against the resolve of the GCM. The stability of information and the stability of migration hang partly on the stability of law.

To realise Objective 3's potential for multiple processes of constructive learning among migration stakeholders, there must be an acknowledgement in practice that using information to promote safe, orderly and regular migration is not the same as using information to deter unsafe, disorderly and irregular migration. An approach oriented towards orderliness rather than deterrence is premised on an awareness that unsafe, disorderly and irregular migration is entangled in personal and structural factors that information cannot override. It also necessitates a readiness to share information non-discriminately, and in conversation with involved actors, on the range of options open to migrants across time.

Objective 3 is oriented towards one-way State provision of information and, as I mention in a commentary on the Zero Draft (p 5–6), this is to the neglect of actions to ensure that people can access a mixture of resources in their efforts to 'seek, receive and impart' information, to use the language of international human rights law (for example, the International Covenant on Civil and Political Rights, 1966, art 19(2)). People use family, friends, chance encounters, non-governmental workers, websites, authorities, lawyers, and so on to situate their personal migratory circumstances. Access to these resources could offset some of the impact of any distrust of State authorities if they are perceived to have interests which conflict with those of individuals. There is a related risk that standards used to describe the quality of information, like 'accuracy', become reified as singular and self-evident. Though there may be benchmarks for technical

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accuracy, such as legislation, information is inherently ambiguous because it is open to multiple interpretations and uses. This ambiguity affects its acceptance. Without some attempt to tailor information provision to the practices and perceptions of migrants, the promise of Objective 3 will not be fulfilled. For now, that promise remains.

*Acknowledgements*

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## Objective 4: Ensure that all migrants have proof of legal identity and adequate documentation

*Amal de Chickera (Institute on Statelessness and Inclusion)*

### Universal Declaration of Human Rights

Article 15.1: *Everyone has the right to a nationality.*

### Convention on the Rights of the Child

Article 7:

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*
2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

Article 8:

1. *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
2. *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

## Introduction

Objective 4 of the Global Compact on Migration aims to “*Ensure that all migrants have proof of legal identity and adequate documentation*”. The objective itself is framed slightly differently to how it was in the Zero Draft, which set out to “*Provide all migrants with proof of legal identity, proper identification and documentation*”<sup>1</sup> The difference between the two versions is subtle. However, the deeper we go into the text of the Objective, the clearer it becomes that this is a watered-down version of the Zero Draft, which has lost many of the positive features of that draft while introducing some negative ones. The overall conclusion to be drawn is that in this ‘final’ form, it is difficult to see how Objective 4 adds to existing obligations that states have towards migrants under international human rights law; whereas some of the language actually represents a softening of such obligations. Further, there is evidently a clear drive towards promoting better cooperation among states, towards what appears to be an unspoken objective of keeping ‘unwanted’ migrants out.

## The Evolution

The main statement of intent under the Objective makes this clear, and therefore, it is useful to directly compare para 20 of the Final Draft with what was para 18 of the Zero Draft:

Zero Draft, Para 18	Final Draft, Para 20
<p>We commit to <b>equip migrants with proof of legal identity</b> and other relevant documentation, including birth, marriage and death certificates, at all stages of migration in order to end statelessness and avoid other vulnerabilities. We further commit to ensure this documentation allows all migrants to have access to services and exercise their human rights, and States can identify a person's nationality upon entry and for return. In this regard, the following actions are instrumental:</p>	<p>We commit to fulfil the <b>right of all individuals to a legal identity by providing all our nationals with proof of nationality</b> and relevant documentation, allowing national and local authorities to ascertain a migrant's legal identity upon entry, during stay, and for return, as well as to ensure effective migration procedures, efficient service provision, and improved public safety. We further commit to ensure, through appropriate measures, that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights.</p>

The first change that stands out, is that while the Zero Draft focused on all migrants at “all stages of migration”, the Final Draft focuses on “nationals” instead. This is a peculiar decision for a Compact for Migration. The rationale appears to be



that if every state provides documentation to all its nationals, states will face no problem in identifying where migrants are from (and importantly, where they can be sent back to). This rationale fails to account for or address the situation of stateless persons or other vulnerable groups (including displaced persons who are not recognised as refugees, victims of trafficking and irregular migrants). This is clearly not an oversight, as the Zero Draft text set out to “end statelessness and avoid other vulnerabilities”, an objective that has been taken out of the Final Draft. What this is then, is a rolling back of the protection reach and ambition of the Objective. It is no longer an Objective which primarily aims to document and protect undocumented migrants who may not have a nationality, but rather, one which primarily aims to document nationals, so that migration can be controlled more effectively and unwanted migrants can be returned to their own countries. The giveaway is the phrase “allowing national and local authorities to ascertain a migrant’s legal identity upon entry, during stay, and for return, as well as to ensure effective migration procedures, efficient service provision, and improved public safety” which frames the Objective primarily from the perspective of state authorities and not individual migrants (as was the case with the Zero Draft). It must be acknowledged that the final sentence is still framed from a migrant rights perspective, but the priority shift that has occurred between the Zero and Final draft is clear.

The seven specific actions (sub-paragraphs A – G) under Objective 4 also deserve further scrutiny.

Paragraph A aims to “Improve civil registry systems, with a particular focus on reaching unregistered persons and our nationals residing in other countries...”. This continues the trend of prioritising the registration of “our nationals”. However, an important improvement in this text is the reference to the protection of the right to privacy and personal data, which were not included in the Zero Draft. Likewise, Paragraph B, which looks at the harmonisation of travel documents in line with International Civil Aviation Organisation specifications, also emphasises the importance of privacy and data protection.

Paragraph C relates to access to consular protection. A significant change from the Zero Draft is that this previous draft called on access to consular documentation for all “migrants”, whereas the Final Draft again limits the scope of this to “nationals”. This may appear to be a legitimate restriction, as states have a right (and obligation) to protect their nationals. However, it is important to note that many migrants become stateless when their own country fails to recognise and protect them as “nationals”. Migrants in such situations find themselves trapped between a failure/refusal to take responsibility of the country of origin, and a failure/refusal to identify and protect, of the country of migration. The Final Draft does not help in any way to address this difficult reality, which presents significant real life consequences on the liberty, movement and other rights of individuals, and also presents difficulties for states. By restricting this provision to “nationals”, individuals whose nationality is disputed will likely remain without cover or protection.

Paragraph E still retains a focus on statelessness. It aims to “Strengthen measures to reduce statelessness, including by registering migrants’ births, ensuring that women and men can equally confer their nationality to their children, and providing nationality to children born in another State’s territory, especially in situations where a child would otherwise be stateless, fully respecting the human right to a nationality and in accordance with national legislation.”

The first two actions of registering migrant births and ensuring gender equal nationality laws are welcome and restate existing obligations under Article 7 of the Convention on the Rights of the Child (CRC) and Article 9 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The text in relation to gender discrimination in particular is an improvement on the Zero Draft, which only focussed on women’s ability to confer nationality on their children and not men’s. It is a missed opportunity however, that the text does not go further and cover other forms of discrimination (race, disability etc.) which also cause statelessness as well as vulnerability in migration contexts.

There is another significant limitation which should be pointed out. Paragraph E as a whole appears to build on the dual assumptions that:

1. Providing migrants with documentation alone will resolve their statelessness.
2. The responsibility to address statelessness lies with the country of origin.

As such, it is largely silent on the more fundamental problem of discriminatory laws, policies and practices which create and perpetuate statelessness (regardless of documentation); and does not re-state the human rights obligation of host states to also play a role in ending statelessness.

And so, while this paragraph sets out obligations of the country of origin of the parents of a child born in a third country, it is silent on the obligations of the country of birth / migration to grant nationality to children born on their territory who would otherwise be stateless. This obligation is clearly set out in both the CRC and the 1961 Convention on the Reduction of Statelessness, and therefore, the language in Paragraph E is unfortunately regressive.

Paragraph F sets out to “Review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights”. This appears to be a positive development. However, it is a levelling down on the language of the Zero Draft, which called on states to “abolish” such requirements (and not ‘review and revise’ them). The language of the Zero Draft was more appropriate, as under international human rights law, states have an obligation to provide basic rights and services to all persons, regardless of their legal status. Hence, the call to abolish any practices which undermine such human rights obligations, was appropriate. Importantly, the Zero draft also made specific reference to “stateless migrants”, and it is not clear why this most vulnerable group has been erased from the final draft.

The final paragraph under Objective 4, calls for the facilitation of participation in community life through the issuance of registration cards etc. This is an important and useful action. However, it is important to note that it is limited in nature, and in the absence of obligations to provide nationality to stateless migrants and regularise their status, it only provides a stop-gap measure, which will grant some freedom and flexibility, but still limit the true potential and security of vulnerable migrants.

## The Future

In conclusion, it must be reiterated that the Final Draft, when compared with the Zero Draft, is weaker on rights and protection, is more limited in scope and does not specifically address the situation of the most vulnerable of migrants (including the stateless). It is disappointing that the Zero Draft (which despite presenting some challenges was largely a more ambitious and progressive text), has been watered down in this manner. Writing from a statelessness perspective, it is also important to reflect on the wider lack of attention to statelessness in the Compact. Many of the other Objectives, including those on data (Obj 1), adverse drivers (Obj 2), pathways for regular migration (Obj 5), combatting trafficking (Obj 10), status determination (Obj 12), detention (Obj 13), consular protection (Obj 14) and return (Obj 21) would have been strengthened through specific reference to statelessness and protecting stateless persons. The failure to address this issue head on, presents a missed opportunity, and is perhaps the biggest clue that the true motivation behind the Global Compact is not protecting the most vulnerable, but border control.

## Objective 5: Enhance availability and flexibility of pathways for regular migration

*Kees Groenendijk (Radboud University)*

International Covenant on Civil and Political Rights, Article 23: *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized.*

International Covenant on Economic, Social and Cultural Rights, Article 6(1): *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 52(1): *Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.*

### Introduction

The Final Draft of the Global Compact for Migration in Objective 5 deals with four categories of regular migration: labour migration, family migration, migration due to climate change and academic mobility. As to the first and second categories, the text, during the negotiations in 2018, clearly has turned vaguer and elements supportive of migrants' rights were deleted.

### The Evolution

#### *Labour migration*

Free movement regimes, visa liberalisation or multiple-country visas and labour mobility cooperation frameworks, familiar instruments in EU law and policy discourse, should be "facilitated" according to point 21(b) rather than rather than "harmonised" as in previous versions. Promotion of "skills matching" has been added in 21(c) and in the new 21(d). New references on ensuring "market responsive contractual labour mobility" and consultation with "the private sector" have been added in those two points as well, possibly reflecting a tendency to grant employer demands more leverage. However, the important sentence on "allowing flexible visa status conversions", present in the Zero Draft and the May 2018 version, was deleted in the final version. The large corpus of binding International Labour Organization (ILO) rules is only mentioned as a possible source in the development of labour mobility agreements: states should be "drawing on relevant ILO standards, guidelines and principles" rather than applying those legally binding international standards.

#### *Family migration*

Here all clues to a possible perspective on a right to family reunification of migrants have been removed. In the first sentence of point 21 the commitment to regular migration that "reunites families" has been replaced by "upholds the right to family life". The latter right, guaranteed in Article 8 of the European Convention on Human Rights and less explicitly in Article 23 of the International Covenant on Civil and Political Rights, only in exceptional cases entails a right to family reunification. The commitment to facilitate "family reunification", still present in May 2018, has been replaced by facilitating "access to procedures for family reunification". Moreover, the reference to "the right to family unity" has been deleted from 21(i).

The EU negotiators were instructed that the text of the Compact "should avoid (...) inclusion of family reunification as effective integration tool" (see the EU Council of Ministers draft negotiation position on the Compact, Council document 6192/1/18rev of 27 February 2018, p. 15, only available to the public after the Compact has been signed). This mandate was successfully fulfilled. The mandate was surprising, since the EU Family Reunification Directive 2003/86 grants a right to family reunification to the spouse and minor children of lawfully resident nationals of non-EU countries with the explicit aim of promoting immigrant integration.

#### *Migration due to natural disasters or climate change*

The Compact distinguishes between migrants compelled to leave their country of origin due to "sudden-onset natural disasters and other precarious situations" and those leaving due to "slow-onset natural disasters, the adverse effects of

climate change and environmental degradation, such as desertification, land degradation, drought and sea level rise". In the first case, according to point 21(g), states should develop existing national and regional practices for admission and stay of appropriate durations by providing "humanitarian visas, private sponsorships, access to education for children and temporary work permits". In the latter case, migration due to slow-onset natural disasters, point 21(h) only mentions planned relocation and visa options. In the final version of both points an exclusion clause was added, restricting their scope to cases where "adaption in or return to their country of origin is not possible".

### *Academic mobility*

The clause on academic mobility added in the May 2018 version, ended unchanged in the final version, suggesting states to expand existing facilities for academic exchanges such as scholarships for students and academics, visiting professorships, joint training programmes and international research opportunities. There is nothing new in this point 21(j) and the adhortation is clearly restricted to students and academics working in higher education. If this suggestion will have any effect in practice, it will stimulate 'brain drain' and assist developed countries in their search for highly skilled workers.

### *Follow-up and Review*

There is little news in the section on follow-up and review, full of dialogue and informal exchange of information. The current High-level Dialogue on International Migration and Development will be renamed "International Migration Review Forum". But the relationship between migration and development is mentioned throughout the Compact, especially in the objectives 19–23. is abandoned. The word 'development' does not appear in the Compact at all. The new Forum will meet every four years beginning in 2022. In two new points states are encouraged to develop "as soon as practical, ambitious national responses for the implementation of the Global Compact" and to conduct "regular and inclusive reviews of progress at the national level" (point 53). Systematic peer review between states is conspicuously avoided. In the final point 54 the President of the UN General Assembly is requested to launch and conclude in 2019 "open, transparent and inclusive intergovernmental consultations" to determine the precise modalities and organisation of the International Migration Review Fora. This begs the question how these intergovernmental consultations will become more "open, transparent and inclusive" than the consultations on the Global Compact itself?

## **The Future**

In October 2018 two anti-immigrant parties in the Dutch Parliament asked the minister responsible for immigration to follow the example of Hungary and the USA and withdraw from the negotiations, claiming that Austria, Denmark and Poland were also considering withdrawal. The fear of these Dutch parties, who at first got little support in Parliament, was that the Compact would stimulate migration and that national courts would read a right to migration in the document. A few weeks later the centre-right Dutch government instructed lawyers at the Ministry of Justice to scrutinise the Compact as to the possibility that migrants could possibly rely on it in court. Considering the status of the Compact as a primarily political document, the repeated statements that the Compact is not legally binding and the references to sovereignty of the states (in points 7, 15 and 23), in my view, it is far more likely that, at least in Europe, the Compact will legitimise restrictive immigration policies rather than courts interpreting the Compact as creating rights of migrants or binding obligations for states that courts should take seriously. Objective 5, according to its title is about enhancing availability and flexibility of pathways for regular migration. But after the removal of references to the right to family reunification and to flexible visa status conversions, the level of aspiration of the text is clearly below the level of rights granted in the current EU migration directives to migrants from outside the EU. Hence, the Compact could be used to legitimise restrictive immigration policies in the EU, however much drafters of the Compact, reasoning from a universal rather than a regional perspective, may have had the opposite objective in mind.

## Objective 6: Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work

*Jean-Baptiste Farcy and Sylvie Saroléa, (Université catholique de Louvain)*

ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975), Article 8:

1. *On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.*

2. *Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.*

### Introduction

The aim of Objective 6 is to ensure decent work for all migrants. This requires actions to protect them against all forms of exploitation and improve recruitment mechanisms and admission systems to guarantee that they are fair and ethical. The overhaul objective is to better protect migrants at work as well as maximise the socioeconomic impact of migrants in both their country of origin and destination, according to the triple-win formula.

In order to achieve this objective, the ratification and implementation of relevant international instruments is a first step. For instance, Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights recognise the right to work and the right to the enjoyment of just and favourable conditions at work, including equal pay for equal work and safe working conditions. Soft law instruments such as the ILO operational guidelines for fair recruitment and the UN guiding principles on Business and Human Rights should also be better operationalized. Cross-regional dialogue can also enhance the respect of human and labour rights of migrant workers. When such rights are violated, employers, recruiters and any suppliers must be held accountable. In order to strengthen the enforcement of decent work norms and policies, the abilities of labour inspectors must be enhanced and, in case of exploitation, firewalls with labour inspections must be established. Specific measures include the prohibition for recruiters to charge fees to migrant workers, in line with Article 7 of the ILO Convention No. 181 (although no reference to this instrument is made), and to confiscate their identity and travel documents. States also committed to end the practice of tying work visas to a single employer or sponsor. Finally, the specific needs and contribution of female migrant workers must be taken into consideration in order to promote gender-responsive labour mobility policies.

### Comparison

Over the course of the negotiation, most commitments have been substantially reduced. First and foremost, the commitment to ratify and implement relevant international instruments was scaled down to 'encourage' and then 'promote' such ratification and implementation. This is a significant change since the final text does not create any new legal obligation, yet only a political commitment. While international conventions related to fair recruitment and decent work should be at the centre of the Compact, States fail to live up to expectations. Regarding soft law instruments, the final draft no longer refers to the promotion of their operationalisation and implement but simply to the need to take them into consideration when developing and improving national policies and programmes. Again, the final commitment is softer than initial one.

Another significant change relates to the practice of tying work visas to a single employer or sponsor which is found in many immigration countries. As the zero draft rightly pointed out, such practice should end in order to prevent violations of human rights and promote opportunities for decent work. As researchers have shown (Dauvergne 2016; Nakache and Kinoshita 2010), work permits tied to one employer are an obstacle to rights enforcement as migrant workers very often do not claim their rights for fear of losing their jobs. Such practice thus increases the risk of abuses and exploitation. As early as the zero draft plus, the initial commitment was substantially changed into ensuring recruitment processes that result in work visas that are portable, allowing migrants to change employers, and modifiable, allowing them to change conditions or lengths of stay, with minimal administrative processes. The final draft only refers to the development and strengthening of such recruitment processes. This means that work visas tied to a single employer or sponsor can be maintained, although change in employer and visas renewal should be facilitated. As a result, the final obligation is softer as ending the practice of single-employer work visas is no longer mentioned and any change in employer remains under administrative discretion.

While equal labour rights remain an important commitment throughout the revision process, the relevant paragraph does not explicitly refer to migrant workers in an irregular situation. The suppression of the reference to all migrant workers suggests that the paragraph is only concerned with regular migrant workers. Over the course of the negotiation, a new paragraph was added to deal specifically with migrant workers in the informal economy. In the zero draft, the establishment of firewalls with labour inspections in case of exploitation was explicitly mentioned. While States

commit to offer them safe access to effective complaint and redress mechanisms and allow them to participate in legal proceedings whether in the country of origin or destination, there is no longer any reference to firewalls. However, the establishment of firewalls is a powerful measure to encourage migrant workers to claim their rights (Crépeau and Hastie 2015). Otherwise, they may not take the risk to file a complaint.

In order to enhance supply chain transparency with regard to decent work conditions, the zero draft stressed the importance to hold all stakeholders, such as employers, recruiters and subcontractors, accountable for any involvement in human and labour rights violations. Throughout the negotiations, the language used in that paragraph was also changed. The stress is no longer on accountability but rather on cooperation with all stakeholders and building partnerships to help them meet their responsibilities. In the meantime, national laws sanctioning human and labour rights violations must be implemented. Overall, this change is positive in the sense that it does not only focus on repression but also, in a complementary manner, on cooperation with employers and stakeholders who may not always be aware of their responsibilities.

Regarding the prohibition to confiscate travel and identity documents, as well as work contracts from a migrant, the second revision of the draft added the words 'non-consensual retention'. For the rest, the paragraph remains similar in content. Yet, the prohibition should be absolute. Reference to non-consensual retention implies that consensual retention need not be prohibited. In a work context, and particularly when migrants are involved, consent should be treated with caution. An absolute prohibition, like that of the zero draft, is a better safeguard against abuse and exploitation.

## The Future

While the zero draft arguably constituted a step forward, most commitments have been curtailed during the course of the negotiation. Most significantly, the ratification and implementation of relevant international instruments is no longer stated. The same is true for the abolition of tied work permits to a single employer or sponsor and the establishment of firewalls with labour inspection services. Moreover, commitments in the final draft are mostly written in an unprecise and non-legally binding manner leaving much leeway to States in their implementation. As a consequence, the added value of the final draft is limited for it does not go beyond what is already enshrined elsewhere, mostly in regional instruments (Ryan and Mantouvalou 2014).

Without a clear commitment to ratify international instruments related to labour mobility, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is unlikely to be ratified by major immigration countries, although the convention contains provisions that are in line with Objective 6 of the global compact (such as equality among workers, non-confiscation of identity documents, work contract in a language workers understand, open work contract after two years maximum,...) without encroaching too much on State's sovereignty (Ryan 2013; Bosniak 1991). The final draft is another illustration of the lack of political support for migrants' rights at the international level which also explains the low ratification of that convention (Pécoud 2017).

The final draft nonetheless calls for equality between migrant workers and nationals regarding working conditions and labour rights as well as greater enforcement of decent work norms by enhancing the abilities of labour inspectors. The promise of equality is however unlikely to turn into deeds, unless it is supplemented by others safeguards, such as firewalls with labour inspection services and open work permits. As is the case today in many countries, in a complaint-driven system migrants do not claim their rights for fear of losing their job or being known to immigration services. Also, precarious work is not only the result of employers' misconduct, it is also structurally produced by the interaction of employment and immigration law (Freedland and Costello 2014; Zou 2015). Immigration control purposes openly conflict with, and supersede, the protection of labour rights. In this regard, the global migration compact fails to provide for a shift towards an effective protection of human and labour rights of migrant workers.



## Objective 7: Address and reduce vulnerabilities in migration

*Idil Atak (Ryerson University) and Delphine Nakache (University of Ottawa)*

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 16(2): *Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.*

### Scope and Proposed Actions

Objective 7 focuses on vulnerabilities in the context of migration. It acknowledges that situations of vulnerability may take place everywhere (i.e., in countries of origin, transit or destination) and outlines a number of measures whereby States commit to respond to the needs of migrants in such circumstances, by assisting them and protecting their human rights. States are invited to pay particular attention to specific categories of “at-risk” migrants, such as children unaccompanied or separated from their families, victims of sexual and gender-based violence, workers facing exploitation and abuse. States also agree to uphold in all circumstances the best interests of the child principle, and to adopt a gender-based approach to address these vulnerabilities. Proposed actions include:

- Critically reviewing existing laws, policies and practices, with a view to eliminating those that create or exacerbate migrants’ vulnerability;
- Involving relevant stakeholders in the identification, referral and assistance of migrants in a situation of vulnerability;
- Improving access to legal services for vulnerable migrants and facilitating their transition to a more secure status;

States are also required to design and apply certain support measures in the case of “migrants caught up in situations of crisis”, such as consular protection and humanitarian assistance.

### Nature and Significance of Changes

In the Final Draft (July 2018), Objective 7 is longer and contains stronger and more elaborate commitments than in the Zero Draft (February 2018). The introductory paragraph (par 23) has been slightly reworded and expanded upon, with an emphasis on States’ commitment to assist migrants and protect their human rights “in accordance with [their] obligations under international law.” This new reference to States’ international law obligations is most welcome. Objective 7 also now includes 12 points of actions, compared to 8 points earlier.

Overall, Objective 7 has been reorganised in the Final draft to allow for a better understanding of States’ specific commitments regarding the situation of migrants in a vulnerable situation. As an example, the previous version of Objective 7 (Zero Draft) contained a sub-paragraph at the very beginning that broadly referred to the operationalisation of the Global Migration Group (GMG) Principles and Guidelines: this part has been moved to the very end of Objective 7, with an undertaking from States to implement their relevant policies in light of these principles and guidelines.

There are new commitments in the Final Draft. One such notable commitment is sub par. h) and i) that enjoin States of destination to facilitate transitions from one status to another. This strengthens the pledge to develop appropriate procedures to *prevent* migrants from becoming irregular, and to proceed to an individual status assessment for those who have become irregular, with a view to *enabling them* to regularise their status. These measures are presented here as “an option to reduce vulnerabilities and as a means for States to ascertain better knowledge of the resident population” (sub par. i)). This is clearly a positive step on a politically sensitive issue; first, because the responsibility of States’ policies and practices in constructing the irregular status of migrants is highlighted; second, because the lack of legal status is acknowledged to be a factor creating migrants’ vulnerability. The focus on States’ duty to take preventative and corrective actions to remedy this situation is thus most welcome. Regrettably, the reference, in sub paragraph g) of the Zero Draft, to the establishment of firewalls between immigration enforcement and public services is absent from the Final Draft. The mention should have been kept as firewalls have proven an effective -albeit temporary- strategy to protect the fundamental rights –such as basic health care, primary and secondary education, and protection against violence- of migrants in an irregular situation in many countries. In addition, any irregular migrant who interacts with State representatives with a view to accessing these rights should be able to do so without fear of deportation. Therefore, “arbitrary expulsion” should be replaced by “expulsion” in sub par. h) because, even if a State is legally entitled to remove an irregular migrant from its territory, this should not happen in circumstances outlined in sub par. h) and i).

Another new action deals with migrant workers (sub par. d)). States agree to review labour laws and work conditions to identify and address workplace-related vulnerabilities among migrants at all skill levels. In doing so, they agree to seek cooperation with relevant stakeholders, particularly from the private sector. This point of action is a most welcome addition, especially as it also highlights the particular protection needs of domestic and irregular migrant

workers. However, it would be important to make here a reference to immigration law: clearly, there are immigration rules (regarding closed-work permits or duration of work permits, for example) that are creating or exacerbating vulnerabilities and abuses against migrants. There is also too often a disconnect between immigration law, on the one hand, and labour law, on the other hand, and such disconnect needs to be accounted for as a factor of vulnerability.

A last important change is States' pledge to take "specific support measures for migrants caught up in situations of crisis in countries of transit and destination countries," such as access to consular protection and humanitarian assistance (sub par. j)). This is a laudable attempt, however, what is meant by "migrants caught up in situations of crisis" needs clarification for this commitment to be effectively implemented.

It is noteworthy that a list of migrants deemed to be in situations of vulnerability is added to sub paragraph b). It includes older persons, migrants with a disability, victims of violence, and members of ethnic and religious minorities. States pledge to establish policies and develop partnerships to identify, assist and protect these migrants. This list is an improvement compared with the Zero Draft in which only children and women were identified explicitly as a vulnerable group. Nevertheless, there are still two important problems with the list provided here. The first one is the failure to mention that this list is open-ended and necessarily non-exhaustive. With the current wording, there is a risk of leaving some groups of migrants -for instance, asylum seekers or stateless persons – outside of the scope of the protective measures. Second, the list was drafted without consideration of the various sources of vulnerability. Vulnerability may arise from an individual's temporary or permanent characteristic, such as a disability or illness; it may result from external threats such as floods or earthquakes; migrants may also be rendered vulnerable by state authorities. This means that Objective 7 cannot be silent about the need for States to identify the sources of migrants' vulnerability: this is extremely important because various sets of responses and state interventions are required to address each of these cases.

As in the Zero Draft, two sub paragraphs are dedicated to States' commitments to address children's rights and vulnerability. Sub par. e) deals with migrant children in general, whereas f) is about the protection of unaccompanied and separated children. Their wording is slightly revised and expanded compared with the Zero Draft. The commitment to "uphold the principle of the best interest of the child as a primary consideration" in situations concerning migrant children is a positive step in the right direction. Indeed, Art. 3.1 of the *Convention on the Rights of the Child*, which is the most globally ratified UN human rights treaty, states the right of children to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that affect them. However, Art. 3.1 has also been interpreted as meaning that the best interests of the child must *always* prevail over any other considerations. This point still needs to be specified in Objective 7 so as to avoid any situation where the interest of a child is seen as an important element to be considered, but not as one that should outweigh other considerations.

Objective 7 remains heavily focused on the situation of children and migrant women. While it is important to emphasise the specific needs of these two groups, this should not promote the idea that other groups of migrants in situation of vulnerability are less deserving of assistance and protection. In fact, with the exception of the above-mentioned sub paragraph b), the actions somehow push the vulnerability experienced by groups other than children and women into the background of Objective 7. To give an example, sub paragraph c), which refers to women, girls and boys as target groups of gender-responsive migration policies, reflects a narrow understanding of 'gender-based vulnerability'. A broader conception is needed to encompass the needs of, for instance, LGBTQI and other migrants at risk of discrimination based on their gender identity and/or sexual preferences.

Finally, it is extremely problematic that States' commitment to ensure access to psychosocial and health care services is only made towards children and migrant women, as all migrants in a vulnerable situation need such services to cope with their difficult condition.

## The Future

The recognition that migrants face multiple forms of vulnerability is part of Objective 7's strengths. So is the placement of human rights at the centre of States' action, in particular through the commitment to adopt a child-specific and gender-oriented approach. Another positive element is the acknowledgment that there are legal and practical impediments within destination states that are conducive to work place abuses and to irregular migration, and that there needs to be policies in place to prevent such situations. Finally, the emphasis on partnerships with local authorities and other public and private stakeholders in assisting migrants in a situation of vulnerability is most welcome.

Several potential challenges may arise when Objective 7 is implemented. In addition to the challenges highlighted above, the term "vulnerability" needs greater clarity. A terminological confusion persists as Objective 7 refers interchangeably to "migrants in situations of vulnerability" and "vulnerabilities of migrants." As well, although there are some positive changes, the wording of Objective 7 still does not stress enough the fact that the vulnerability in which migrants find themselves is mostly constructed by States through policies and practices, such as border controls, interception measures, restrictive migration and asylum rules. The non-acknowledgment of this fact effectively shifts the responsibility for the problems faced by migrants away from States. This, in turn, hampers efforts to design and implement adequate solutions to fulfill migrants' most pressing needs.

Finally, States' pledge to protect migrants in situations of vulnerability needs to be supported by effective mechanisms of accountability and independent oversight, and yet Objective 7 is silent on this point. It is thus unclear how States' compliance with their commitments will be ensured.



## Objective 8: Save lives and establish coordinated international efforts on missing migrants

*Syd Bolton and Catriona Jarvis (The Last Rights Project)*

Universal Declaration of Human Rights, Article 3: *Everyone has the right to life, liberty and security of person.*

In summary, Objective 8 of the Global Compact for Migration contains three new elements: to save lives and prevent deaths and injury; to identify the missing and the dead; and to provide assistance to their families.

It is worth stating at the outset, that through Objective 8 of this Compact, states have, for the first time, formally recognised that in embarking upon migration journeys, people's lives are put in jeopardy every day and many go missing, die or are bereaved as a consequence. The Last Rights Project welcomes this ground-breaking development. However, the responsibilities of states in this regard are not new, rather they have long existed and can be found within established international law. For example, Article 6 International Covenant on Civil and Political Rights, the right to life and the duty to investigate; the UN Convention on the Law of the Sea, Article 98, the duty to search and rescue. The Last Rights Project has itself published a statement setting out these international legal obligations of states and the rights of families.

Objective 8 cannot be read in isolation from the rest of the Compact but space does not permit such an analysis here. For the purpose of this commentary we restrict ourselves to the Objective itself and the context in which it is framed, namely the Preamble to the Compact and the underpinning New York Declaration, which offers succinct clarity as to the concerns it seeks to address:

Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive... We are determined to save lives. Our challenge is above all moral and humanitarian... (New York Declaration, paras 9 and 10).

The unnecessary pain and suffering of migrants and their families, invariably compounded by inadequate or even antagonistic state practices (e.g. Italian government refusal to allow rescued migrants to disembark) must be prevented and their rights and complex needs must be addressed in a much more cooperative way, both at national and international levels. Death and distress do not distinguish between those embarking by choice on migration journeys and those who are compelled by persecution, conflict or other circumstances, but both frequently occur as a consequence of forced 'irregular' migration in the absence of lawful modes of migration. Artificial distinctions and barriers based on the immigration status of missing, deceased and bereaved persons must not be erected when addressing the legal and practical issues of search and rescue, the treatment of missing persons, the management of bodies and all the duties owed to the deceased and their families.

This is a brief Commentary on Objective 8 of the Final Draft of this Compact, set against its initial iteration in the "Zero Draft". The document as a whole has been through several revisions along the way which may offer some useful illumination as to the intentions of the drafters during their travaux, but comment on our part on such intentions would be little more than conjecture. As a general observation, the progress of the draft of Objective 8 to its final version has been one mostly of minor refinement of language and of clarification rather than major revision but on the whole, makes potentially positive improvements from the perspective of migrants provided, of course, that these commitments are matched by the will of states to provide the necessary resources and to implement them. There are nevertheless missed opportunities and changes made during the drafting process which may yet have a negative impact, which are discussed below. Whilst a detailed analysis of the version by version progress of the drafting is of importance, our focus here, as an NGO, is more immediately on the impact that the final document will have on migrants, their families and the agencies and organisations who will need to use it both as policy guidance and a practical tool for the protection of migrants and their rights.

Objective 8's stated purpose is "to save lives and establish coordinated international efforts on missing migrants". The content of the objective itself is actually significantly broader in scope. It includes commitments for states to act both individually and jointly not only to save lives through practical and material measures (e.g. search and rescue operations), but also calls for cooperative measures to prevent migrant deaths *and injuries* happening in the first place, including prevention of collective expulsion, improved reception conditions, guarantees of due process for individuals and the protection of humanitarian assistance against being deemed unlawful. It also makes the very welcome step towards developing better cooperation and standardisation of information gathering and sharing to assist in the process of identifying missing and deceased migrants and to develop better ways of communicating with families of missing and deceased migrants. So far so good.

However, it is apparent from the final revision that even though the Compact itself will not create any new, legally binding obligations on states (Final Draft, para 7), nevertheless it seems there is still sufficient anxiety that the provisions in the text should not establish too onerous a request to states to implement these positive statements of good intention.

For example, whilst in the Zero Draft the basic requirement was “to save lives” (Zero Draft, para 22). This has been modified so that the Final Draft now reads “To cooperate internationally to save lives...” (Final Draft, para 24). Whilst cooperation internationally is of course laudable and indeed necessary when addressing cross-border issues, the final text language puts that obligation at one remove, arguably distancing the individual states onus to prevent migrant deaths and save lives. At the same time, the final text adds a “collective responsibility to preserve the lives of all migrants”. Given that states already have clear existing international legal obligations, including in respect of search and rescue at sea, such as Article 98 of the UN Convention on the Law of the Sea, it is perhaps a missed opportunity that the Compact does not also re-affirm all existing legal duties.

In the implementation of the objective we see a further dilution in the final draft from the initial wording: “In this regard, the following actions are instrumental” is now changed to: “To realize this commitment, we will draw from the following actions...”. This is regrettable as it would appear not only to demote the actions identified in the text in terms of importance but also to permit a ‘pick and mix’ approach as to which elements of Objective 8 states wish to focus upon, rather than seeing the whole as a minimum prerequisite of good practice.

It is interesting that paragraph 24 (a) of the Final Draft now calls on search and rescue procedures and agreements to “... uphold the prohibition of collective expulsion, guarantee due process and individual assessments...” where previously it simply required procedures “that refrain from pushbacks at land and sea borders...” (Zero Draft, para 22a). Whether legal precision is being sought through making this change, rather than using the more general (and imprecise) term “push-back” is not known to the authors, but the wording is now consistent at least with the European Court of Human Rights Grand Chamber judgment holding a violation of human rights through collective expulsion in the “push-back” case of *Hirsi Jamaa and Others v. Italy* in 2012 and would appear to strengthen the protections of the individual migrant compared to the initial draft.

Lastly, in Paragraph 24a of the Final Draft, the wording: “ensure that the provision of assistance of an *exclusively humanitarian* nature for migrants is *not considered unlawful*” replaces the original version: “ensuring that the provision of *humanitarian* assistance for migrants is *never criminalized*” (authors’ emphasis). The changes appear both positive and negative, given that it is very unclear where the boundary between humanitarian and non-humanitarian assistance might lie, or indeed what non-humanitarian assistance would be at all, whether in the context of an immediate and urgent rescue operation or a situation which may be less immediately urgent but intrinsically necessary for the safety and well-being of the migrant, but which may be construed by states’ border officials as facilitation of illegal entry (for example the prosecution of civil society humanitarian actors in France, Greece, USA and elsewhere, for provision of food, water, shelter etc). The addition of the word *exclusively* can only add confusion to the provision. It is however welcome that the Compact now recognises in Objective 8, that it is not solely the criminalisation of humanitarian assistance that undermines the rights of migrants, but that the deliberate and disproportionate use of civil law and legal obstacles, both domestic and supra-national, to render humanitarian assistance unlawful for non-compliance must also be prevented.

Whereas Paragraph 24 (a) to (c) focuses on actions in relation to saving lives and preventing death and injury, Paragraph 24 (d) to (f) of the Final Draft addresses matters concerning deceased and missing migrants and their families. Whilst it is a positive, even ground-breaking, development to see a global initiative like this address such difficult issues for the first time it is to be hoped that this is just the beginning of a much more comprehensive set of ultimately binding obligations such as those proposed by The Last Rights Project (see Mytilini Declaration below). In the meantime, the Compact takes some very welcome steps forward whilst missing an opportunity to go much farther.

The tragedy of any individual death or missing person is compounded by the suffering of the families that are left behind, not knowing what happened, or knowing, but unable to obtain practical assistance and justice, to grieve and lay their loved ones to rest in accordance with their wishes. This is acutely the case when it concerns those who have lost their loved ones in the context of migration where families are often separated not just by loss, but also by fragmentation across multiple borders on their migration journeys, by a lack of legal status, lack of access to support services and to legal aid.

Objective 8 goes a little way to addressing some of these specific needs. Paragraph 24 (d) calls on states to establish “transnational coordination channels” to assist families seeking missing relatives “while respecting the right to privacy and protecting personal data”. Undoubtedly this is a necessary facility not just at a transnational level but a national one, that has to work in a manner which provides families with confidence that their own and their family’s data is not going to be used in any ways beyond that purpose. At present, many families simply do not trust some states not to abuse their personal information and turn it against their families, particularly for immigration enforcement purposes.

Paragraph 24 (e) relates specifically to the creation and maintenance of systems for collecting, holding, sharing and examining forensic data related to the deceased person. It remains regrettable, even if used in some clinical and policing contexts, that the bodies of deceased migrants are still referred to as a “corpses” in this final draft. It is not only inconsistent with the language used elsewhere in Objective 8 but insensitive to bereaved families. Nevertheless, the development of an internationally consistent forensic data collection and sharing standard would be a significant advance toward providing answers to families. Like the cooperation envisaged for the search for missing migrants, whether at sea or on land: in deserts, mountains, rivers and elsewhere, the forensic data needed is similar and requires the trust and confidence of families if any system is to be workable. For many families the risks of sharing data with states, especially country of origin states may be too great. Transnational mechanisms must have rigorous safety and confidentiality standards built in, to prevent such data being misused. Traceability of bodies once laid to rest is a necessary aspect

of such systems. Far too many unidentified bodies, once buried are not traceable even through local records. This either delays tracing or renders it impossible for families, denying them their basic human rights. Even when a body is unidentified, it is essential that the burial site and body are documented and systematic, searchable records maintained. A national mechanism in all states should be established that is responsible for the implementation of these standards and that is able to work in co-operation with corresponding mechanisms, regionally and internationally.

Paragraph 24 (f) is an entirely new section since the Zero Draft and calls on states to "Make all efforts, ... to recover, identify and repatriate the remains of deceased migrants to their countries of origin, respecting the wishes of grieving families..." This is a positive addition to the Compact and underlines the fact that the duties of states are far more than the clinical, legal, forensic task of identifying bodies, but that bereaved families are entitled to every assistance to help them to lay their relatives to rest in a way and in a place that is appropriate to their wishes, to grieve and to mourn and to pay respects. It may not be possible or even be desired by the family for the deceased to be returned to their country of origin, for example where the deceased was a refugee. Such a requirement in Objective 8, 24 (f) should not be seen as an absolute condition but based on the wishes of the family.

"...in the case of unidentified individuals, facilitate the identification and subsequent recovery of the mortal remains, ensuring that the remains of deceased migrants are treated in a dignified, respectful and proper manner"

This is a sensible addition, but one that should also be read in accordance with the provisions on traceability in the same paragraph to ensure that every opportunity is given for family members to participate in procedures, not least so that in future they may eventually be able to identify their relatives.

Whilst these measures are self-evidently positive, the Objective lacks certain obvious commitments. For example, there is no provision calling on states to enable the movement of bereaved family members across borders to participate in identification, participation at inquests and other coronial procedures, legal proceedings, burial and paying respects. There is no provision for states to establish annual budgets and funding for welfare, psychological and advocacy support for bereaved families, with special provision for children, and nothing exhorting states to make legal aid available for their participation in proceedings related to the death or disappearance of their relatives. A subsequent draft would benefit from such additions.

## The Future

Migrants do not die by accident but by design. As the Special Rapporteur of the Human Rights Council, Dr Agnes Callamard found in her 2017 report:

"[...] evidence... suggests multiple failures on the part of States to respect and protect refugees' and migrants' right to life, such as unlawful killings, including through the excessive use of force and as a result of deterrence policies and practices which increase the risk of death."

During the period in which the Global Compact has been drafted, The Last Rights Project has been working to develop a new set of proposed international standards. On 11 May 2018 international civil society signed *The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys*. On the whole, the provisions within Objective 8 are consistent with the standards set out in the Mytilini Declaration. The Last Rights Project continues its own work to finalise a Protocol to the Declaration including detailed Guidance for all those working with the families of the missing and the deceased, an Explanatory Note and Glossary, to be completed by May 2019. It is hoped that in the implementation of Objective 8 of the Global Compact, states will take into consideration all the principles set out in that Declaration and look to its Protocol for practical guidance.

## Objective 9: Strengthen the transnational response to smuggling of migrants

*Dr Jean-Pierre Gauci and Francesca Romana Partipilo (British Institute of International and Comparative Law)*

Migrant smuggling is defined in the **Smuggling Protocol (art.3)** as:

“The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”

### Introduction

Objective 9 of the UN Global Compact for Migration addresses the issue of migrant smuggling. The new objective highlights some important issues, including the need to differentiate between trafficking and smuggling, the need to protect smuggled migrants (including from criminalisation for being subject to smuggling) and the critical role of cooperation in preventing, prosecuting and punishing smuggling. The Final Draft however does not move the needle forward in terms of global implementation of the Smuggling Protocol and especially its protection provisions.

### Evolution of Objective 9

In this section, we reflect on the evolution of the objective from the perspectives of its relationship with the Smuggling Protocol, the human rights of smuggled migrants, the criminalisation of smugglers and the issue of cooperation. We argue that, notwithstanding the important contribution made by Objective 9 to the protection of smuggled migrants, there remain various issues on which the Final Draft has failed to move the needle forward. This represents a missed opportunity to further strengthen the rights of smuggled migrants.

First, as regards the relationship with the Smuggling Protocol, the various drafts of the Compact have softened the requirement on States to fully implement the requirements of the Smuggling Protocol. The first draft spoke directly of: ‘Sign, ratify or accede to, and implement the Protocol (...)’. In the ‘Draft Revision One’, this was softened to ‘Encourage signature, ratification, accession and implementation of the Protocol’. By the Draft Revision 2, the reference to encouragement had been softened to: ‘Promote signature, ratification, accession and implementation’. Interestingly between the Draft Revision 2 and Draft Revision 3, the reference to signature was dropped so that the final text refers to ‘Promote ratification, accession and implementation of the Protocol’. By way of context, it is worth noting that at time of writing the Protocol has 146 Parties and 112 Signatories.

Second, on the issue of criminalisation, the Final Draft of the Compact reflects the requirements of the Protocol, in seeking criminalisation through legislative or other measures, of smuggling committed intentionally, in pursuance of financial or other material benefit, and for the crime to be considered aggravated in certain circumstances set out in international law. There is a clear and unequivocal commitment in the Protocol, furthered in the Compact, to ensuring that the law penalises smugglers and that policy and practice ensure they no longer act with impunity. The emphasis on the requirement of intent and financial or other benefit is critical, especially when seen in a context where humanitarian and other rescue operators are being impeded from performing their role under the pretext of (amongst others) counter-smuggling investigations. Nonetheless, the fundamental requirements of ‘intentionality’ of the conduct and of the connected financial or material benefits were not included in the first drafts of the Global Compact and were only added to the document later. The requirement of the intentionality of the conduct was included in Draft Revision 2 of the Global Compact, while Draft Revision 3 envisaged that the financial or other material benefit for the smuggler could be obtained either directly or indirectly, therefore enlarging the scope of the punishable conduct and bringing it in line with the definition set out in the Protocol. The re-iteration of the requirements of ‘intent’ and ‘financial or other material benefit’ should provide an implicit impetus for States to refrain from actions that hinder search and rescue (SAR) operations. Nonetheless, this requirement has not prevented several governments from employing domestic criminal law in order to criminalise SAR activities carried out by private vessels and NGOs, effectively hindering humanitarian action in the Mediterranean Sea and leading to hundreds of avoidable deaths.

Third, the counter-side of criminalisation relates to the criminalisation or otherwise of smuggled migrants for irregular entry. Whilst, in line with the Protocol, smuggled migrants should not be criminalised for the very fact of being smuggled, the issue of penalisation for irregular entry remains a critical concern. The Protocol does not make provision in this regard. Critically, Article 31 of the Refugee Convention makes provision for non-penalisation of refugees ‘on account of their illegal entry or presence’. The Compact, set out to address this issue. The Zero Draft called on States to ensure that national legislation reflects irregular entry as an administrative, not a criminal offence (Objective 9, art.23, para.d). This was considered a positive development. By Draft Revision 2, the wording had changed to a commitment to ‘Work towards policies and practices that treat the circumstances of irregular entry and stay as an administrative rather than a criminal offence’. By the Final Draft, this requirement is eliminated and instead, the position is reverted to that as set out in the Protocol in that States commit to ensuring that migrants do not become liable to criminal prosecution for having

been the object of smuggling (Objective 9, art.25) but this 'notwithstanding potential prosecution for other violations of national law'. Any new protection from prosecution for irregular entry that the Zero Draft proposed has therefore been eliminated in the Final Draft.

Whilst failing to push forward non-criminalisation for irregular entry and to tackle other protection dilemmas the compact still makes a number of important provisions relating to protecting the human rights of smuggled migrants. In particular, it commits to:

Develop gender-responsive and child-sensitive cooperation protocols along migration routes that outline step-by-step measures to adequately identify and assist smuggled migrants, in accordance with international law.

This provision, which is a result of the evolution of the objective from the Zero to the Final Draft, merits some unpacking. First, the idea of developing gender and child sensitive protocols an important one – and not one that's staple in discussions of migrant smuggling. It reflects a human rights discourse that is often sidelined when discussing smuggling. An explicit provision regarding unaccompanied minors and their particular safeguarding needs would have further strengthened this provision. Second, the commitment to 'identify and assist' smuggled migrants is also relatively new (although it does receive a mention in the UNODC Model Law on smuggling). In abstract, it is certainly a positive thing – smuggled migrants might require assistance and need to be identified in order to access such assistance. The risk of course is that such identification is vehemently pursued not for the purpose of assisting smuggled migrants and respecting their human rights, but rather for the purpose of ensuring punishment for 'irregular entry' and/or return as soon as possible. The commitment to ensure that 'counter-smuggling measures are in full respect for human rights' provides limited comfort on this issue. Such respect must necessarily include effective access to an asylum system and the application of the non-discrimination principle.

Key to international efforts combatting migrant smuggling is the issue of international cooperation (see Jean-Pierre Gauci and Patricia Mallia, 'The Migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Intersectionality and Multi-actor Cooperation'). The Smuggling Protocol is intended to promote such cooperation. As for the Global Compact, while the first draft of the document did not explicitly mention international cooperation amongst states, it did refer to the necessity to 'intensify joint efforts to prevent and counter smuggling' (Objective 9, art.23) and to 'institutionalise transnational mechanisms to share information and intelligence' on smuggling-related issues (Objective 9, art.23, para.b), recognising the fundamental role that transnational cooperation could play in preventing and countering smuggling. Draft Revision 1 explicitly noted the need to 'strengthen capacities and international cooperation to penalise, investigate and prosecute the smuggling of migrants' (Objective 9, art.24). Further, Draft Revision 2 envisaged 'cross-border law enforcement and intelligence cooperation in order to prevent and counter smuggling of migrants with the aim to end impunity for smuggler' (Objective 9, art.24, para.c). Therefore, the Final Draft of the Global Compact contains a clear commitment to international cooperation to prevent, investigate, prosecute and penalise the smuggling of migrants in order to end the impunity of smuggling networks. The Final Draft goes into considerable detail in this regard, identifying the level at which such cooperation should take place (transnational, regional, bilateral), the forms of cooperation that should take place (strengthened capacities, sharing information and intelligence) and the timing of such cooperation (across the cycle from prevention to penalisation). In this regard, the Final Draft of the Compact makes an important contribution moving the needles forward from what the Protocol requires. The Draft text however does not acknowledge the limits of such cooperation, in line with international human right standards. In particular, it fails to acknowledge that such cooperation may, in some situations, result in violations of human rights (as exemplified by the current cooperation between Italy and Libya) which also raises questions of responsibility under the Articles of State Responsibility (See: JP Gauci, *Back to Old Tricks*). The Compact's commitment elsewhere towards ensuring that ensuring that 'counter-smuggling measures are in full respect for human rights' (Objective 9, art.25.c) provides little comfort in this regard.

From as early as the First Draft, there was a recognition of the risk inherent in conflating smuggling with human trafficking. In earlier commentary on the Objective, we noted that the acknowledgment of the risk of the conflation was a key strength of the compact (see Elspeth Guild and Tugba Basaran, *First Perspectives on the Zero Draft*, in *EU Migration Law blog*). The Final Draft represents an important development in this regard. The Zero Draft made a commitment to 'Amend migration policies and procedures to distinguish between the crimes of smuggling of migrants and trafficking in persons'. Later drafts, added a reference to the need to design and review migration policies in this regard (Zero Draft Plus) and the recognition that 'smuggling migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance' (this was added in Draft Revision 2: Objective 9, art.24, para.f). This recognition of the risks of conflation, coupled with an acknowledgement of the potential overlaps is a critically important contribution of the compact in this regard. Indeed, this development reflects the practical reality increasingly faced by smuggled migrants who, given the cost of smuggling, might be pushed into situations of trafficking as a means to pay for the smuggling services. In this situation the distinction between the two crimes must be borne in mind in order to ensure that the highest level of protection is provided to the migrants who were subject to both smuggling and trafficking.



## The Future

Whilst the Compact makes a reference to the non-criminalisation of smuggled migrants and the requirement of 'intent' and 'financial or other material benefit', it does not go so far as to highlight the need to protect humanitarian actors, including commercial vessels engaged in rescue and NGO Rescue operators from investigation and prosecution under the pretext of smuggling (or collaborating with smugglers). This is an issue that has arisen on multiple occasions in various countries (examples from the Central Mediterranean come to mind (see FRA, 'Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations, here)). The failure of the Compact to unequivocally address the issues is a missed opportunity. Indeed, while the requirement of 'intent and financial or other material benefit' could in principle provide an impetus for States to refrain from actions that hinder search and rescue operations, state practice reflects a different scenario, with criminal proceedings initiated against NGOs and private individuals for their alleged support to smugglers and irregular migration. The recent events in the Mediterranean Sea, including the seizure of NGOs' vessels and the legal actions taken against their crews, demonstrate the necessity to clearly demarcate the boundaries between legitimate humanitarian action and support to irregular migration. The requirement of 'intent and financial or other material benefit' is a useful tool to operate this fundamental distinction and ensure that domestic criminal law is not instrumentalised to prosecute humanitarian actors. However, the failure of the Final Draft to clearly highlight the need to protect humanitarian actors from frivolous accusations and prosecutions reflects a failure of the Draft in this regard.

Moreover, the Final Draft of the Compact fails to address the real reason migrant smuggling occurs at all and is such a profitable 'enterprise' – and that is the lack of real and effective alternatives by way of available safe and legal pathways. The provision of legal pathways for regular migration would not only improve the protection of the human rights of migrants but also increase solidarity and responsibility-sharing among states (see Leonie Ansems De Vries, Henry Alexander Redwood and Jean-Pierre Gauci, 'Legal Pathways to Protection: towards the provision of safe, legal and accessible routes for refugees and vulnerable migrants' here). Importantly, the Final Draft, through Objective 5 sets the objective of facilitating regional and cross-regional mobility and to review and revise existing options and pathways for regular migration. This is very much left within the remit of labour migration although it briefly notes that such opportunities would also benefit migrants in vulnerable situations. (see commentary Objective 5).

On balance, the Final Draft of Objective 9 represents a missed opportunity to move the needle forward both in the protection of smuggled migrants and in addressing migrant smuggling more generally. Given the emphasis that States (especially States in destination countries) place on the need to combat smuggling, one would have expected the Compact to provide more meat to the obligations as they arise from the international legal framework (most notably the Smuggling Protocol). The Final Draft text does not do much of this, albeit re-iterating some important elements including the need to clearly differentiate between trafficking and smuggling, the need to protect smuggled migrants and emphasising the need to prevent smuggling and punish smugglers. The hope is that the adoption of the Compact will provide renewed energy to the fight against smuggling, and to the development of new ideas of how the phenomenon can really be addressed, whilst respecting and promoting the rights of smuggled migrants.

## Objective 10: Prevent, combat and eradicate trafficking in persons in the context of international migration

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UN Anti-Trafficking Protocol, Article 2: The purposes of this Protocol are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.

### Introduction

The Global Compact on Migration contained three main commitments concerning trafficking in human beings. The first one has a criminal law approach, i.e. investigation, prosecution and penalisation of the offence of trafficking in human beings. This is clearly reflected in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons that imposes an international law obligation upon its State Parties to criminalise human trafficking. The second commitment is 'discouraging the demand that fosters exploitation leading to trafficking.' The third commitment is enhancing identification, assistance of and protection of migrants who have become victims of trafficking. As opposed to the first commitment, the last one is not reflected in binding legal norms incorporated in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. The latter contains only recommendations to this effect. (This weakness has been to a certain extent rectified at regional European level; see Stoyanova 2017). Therefore, identification, protection and assistance of migrants who have become victims of trafficking in human beings is still a weakness and states at a global level are yet to endorse binding commitments.

It is noteworthy that the Global Compact on Migration does not refer to the commitment of strengthening border control measures as a method of preventing trafficking in human beings. In contrast, Article 11(1) of the UN Anti-Trafficking Protocol formulates an obligation upon its State Parties to strengthen border controls, for which reason the Protocol has been an object of critique (Hathaway 2008; Gauci and Stoyanova 2018). In a much vaguer way, under Objective 10 the Global Compact on Migration formulates the action of *monitoring irregular migration routes* 'which may be exploited by human trafficking networks to recruit and victimize smuggled or irregular migrants, in order to strengthen cooperation at bilateral, regional and cross-regional levels on prevention, investigation, and prosecution of perpetrators, as well, as on identification of, and protection and assistance to victims of trafficking in persons.' It is positive that at least in the context of the Global Compact the strengthening of border control has not been justified with the humanitarian objective of preventing human trafficking. Empirically, it is questionable whether border controls reduce the risk of human trafficking (Gauci and Stoyanova 2018). In addition, enhancement of border control does imply that irregular border crossings are more difficult and dangerous, which might not only increase the risks to the migrants' lives and well-being (Spijkerboer 2017), but can also make the services of human smugglers more expensive. The latter in turn prompts migrants to enter into exploitative arrangements for procuring illegal entries, which might actually amount to human trafficking (Bhoola 2016).

Still, in light of the recent policy developments particularly at the level of the EU, there is a reason to be concerned that states have committed to monitor irregular migration routes and to strengthen cooperation at bilateral, regional and cross-regional levels. In the rest of this post, I will argue that there are reasons for such concerns and we should carefully scrutinise the forging of such cooperation frameworks.

More specifically, the EU Member States have been applying forms of migration controls that are based on contracts with countries of origin and transit (COM(2016) 385 final; Malta Declaration 2017; COM(2017) 471, 6; COM(2016) 385, 15). This has been a development that fits within the external dimension of the EU migration policy and that aims to develop cooperation with third countries that are countries of origin and transit so that they themselves enhance their border controls and prevent transborder movement, including departures. (On the compatibility of these measures with the right to leave as protected by Article 12(2) of the ICCPR, see Guild and Stoyanova 2018.) More concretely, such forms of cooperation imply, for example, supporting and training the Libyan coast guards or provision of border control equipment and intelligent. In the EU policy documents these are justified with the need to save migrant's lives and to combat human smuggling and human trafficking.

The problem with these forms of cooperation is that they reduce the possibilities for holding the supporting states (i.e. the European countries of destination) internationally responsible. The reasons for this reduction are at least two. First, the individuals affected by the measures are not within the territory of the European states, which in light of the jurisdiction threshold under human rights law, raises the question whether these states can be duty bearers that hold any obligations towards these individuals. These states certainly take measures (by, for example, funding the Libyan border guards) that affect migrants by, for example, preventing their departures and containing them in transit countries, where they are subjected to severe human rights law abuses, including slavery and human trafficking. However, it is disputable whether mere affectedness can trigger the constitution of these states as duty bearers under human rights law.

The second reason is that the causal relationship between the measures pursued by European states and any damage to interests protected by human rights law is more subtle (Giuffré and Moreno-Lax 2018, 'contactless controls'). This complicates efforts to hold European states internationally responsible under human rights law for any harm sustained by the migrants that are affected by these measures.

## The Future

As to the future, two challenges can be identified in light of the analysis above. First, ensuring that victims of trafficking are actually protected and assisted in destination states, including by being identified as victims. Second, destination states have to reconsider their policies towards and relationships with third-countries that are countries of origin and transit so that the former countries do not create conditions that are ultimately conducive to exposing individuals to slavery and human trafficking.

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## Objective 11: Manage borders in an integrated, secure and coordinated manner

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Article 2, International Covenant on Civil and Political Rights 1966: 1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### Introduction

Objective 11 calls for collaboration amongst states on border management that facilitates border crossing and enhances security of States, communities, and migrants. In furtherance of that border management policy, it commits to respecting states' national sovereignty and their obligations under international law, the rule of law, human rights of all migrants irrespective of their status, and the principle of non-discrimination. It also promotes gender-responsive and child-sensitive actions in the field. It further proposes specific actions within this overall framework. In this context it accepts affirmative action to assist migrants in situations of vulnerability at or near international borders, to protect children at international borders, and to reunite families. It also mentions the use of information technology, pre-screening of people seeking entry, and imposing pre-screening liability on air carriers as actions to be implemented in ensuring efficient border crossings. Other actions include streamlining of border screening procedures in light of human rights standards, engaging cooperation amongst states on technical assistance particularly in emergency situations such as search and rescue, reviewing states' laws on irregular entry or stay in light of their obligations under international law, and promoting state cooperation on border management that takes into account the best practices as referred in OHCHR Recommended Principles and Guidelines on Human Rights at International Borders.

### Comparison

Throughout the negotiation process, there have been significant changes in the text that might be of great importance in addressing whether the UN Global Compact can deliver the objective it seems to promise. First of all, when the text was revised for the version of 5 March 2018, it included a reference to 'national sovereignty' as a basis upon which commitments to border management collaborations should be fashioned. This change undermined the earlier analysis on the Zero Draft (of 5 February 2018) that the UN Global Compact could promote the position that border controls are an interstate matter, rather than exercise of state sovereignty. In this context, despite its continuous reference to facilitating cooperation amongst states on border management, the Objective might increase tensions on this matter between neighbouring states as well as other states further afield that will be impacted by such possible tensions. Also, because it maintains the idea of looking at the border through the lens of national sovereignty, it renders the protection of human rights standards in the context of border controls toothless. The key reason for this insight is that states can refer to their national security interest (the extent of which depends on states' exercise of national sovereignty) in order to justify limitations on human rights. For example, the fight against terrorism is often put forward by states to justify the practice of collecting a wide spectrum of information about migrants retained for periods lengthier than necessary for identifying who crosses borders. For example, states participating in the Schengen Agreement have access to large-scale databases (Visa Information System on visa application, Schengen Information System II on immigration purposes, and EURODAC on asylum) that maintain a wide array of personal information (including sensitive data such as biometrics) and are used for law enforcement purposes.

The second change concerns the context within which irregular migration is placed in the Objective. All versions of the Objective maintain a reference to the term 'security' and its 28 May 2018 version mentions prevention of irregular migration as an action in furtherance of ensuring security. In other words, it takes a security-oriented approach when addressing irregular migrants. However, regular/irregular migration relates to distinct areas other than security. Prevention of the irregular movement of persons relates to state's border control action in checking who is entering its territory and their documentation. Thus, this should be governed by administrative law. Regular or irregular status of migrants, on the other hand, applies once the person crosses the border and on the basis of the laws of the state he or she is in. Thus, this status is governed by national immigration laws. In this context, the security framing of regular/irregular migration as in the Objective intertwines separate areas of border control, migration regulation, and law enforcement. Policies adopted in this frame gain visibility through the walls, barbed wires, and increased technological surveillance at border crossings. Those actions undermine safe mobility because establishing harder borders forces people to take more clandestine and hazardous paths to reach the destination state. Also, harder border practices not only aggravate unsafe and irregular border crossings, but also make migrants with irregular status more vulnerable once they are in a country. Having violated immigration laws, they might not report to police sexual abuse or racism that they encountered for fear of deportation – a consequence of which would deprive them the right of access to courts. This then weakens the Objective's proposition to commit to protecting human rights of all migrants, regardless of their status in implementing border management policies.

Still, there is a third significant change in the text of the Objective that can be considered as a positive element towards recognition of states' responsibilities towards respecting human rights of irregular migrants. In this regard, the final version of the text (11 July 2018) included an action to review and revise laws sanctioning migrants with irregular status in light of the principle of proportionality, equality, prohibition against discrimination, due process and states' other obligations under international law. Indeed, currently, custodial sentences or fines are imposed upon migrants with irregular status and provided that certain conditions are met, they can also be detained in order to ensure their removal. These actions might disproportionately interfere with their right to liberty and security, right of access to courts, human dignity, and economic and social rights such as housing and education. For this reason, it is welcome that the Objective makes reference to revision of policies for irregular entry or stay in light of states' obligations under international law.

Lastly, the inclusion of the respect to the rights to privacy, personal data protection and the principle of non-discrimination in the implementation of information technology at border controls tilts the scale towards protecting migrants' human rights. Accordingly, in the Zero Draft, the Objective mentioned the use of information technology and pre-screening of passengers and maintained this action throughout its later versions. Resorting to these technologies raises concerns over human rights, particularly the right to privacy because the growing reliance on those technologies correlates with the establishment of databases that seeks to silence criticisms over collection, retention, and use of a wide array of personal information about individuals (including their sensitive data such as biometric data) *en masse*.<sup>1</sup> Moreover, advances in information technology make it possible to make assumptions about individuals' behaviour through collecting and sorting huge amounts of information about them. The Objective's reference to the implementation of pre-screening of arrivals indeed resonates with this 'fishing expedition' scenario. This is because, in practice, states aim at finding those who were not identified as suspects by law enforcement authorities but might pose a 'security' threat to the country they seek to enter. In this context, the pre-screening method entails finding correlations between individuals' travel and behavioural patterns with those patterns that are associated with perpetrators of terrorist or criminal activities. On the basis of this method, an individual might be denied entry irrespective of the fact that no criminal suspicion has fallen upon him or her. It, thus, creates a generalised suspicion about individuals contrary to the presumption of innocence. These concerns are addressed in the revised version of the UN Global Compact in 28 May 2018. In this regard, the Objective states that the use of information technology and pre-screening methods in the context of border control must respect the right to privacy and personal data protection as well as the principle of non-discrimination. In other words, the Objective recognises that states are limited by their obligation to respect those rights when they collect, store, and use personal information of migrants.

## The Future

At face value, Objective 11 contains a number of references that are welcoming. Overall, it repeatedly mentions the respect to international human rights of all migrants and refers to child-specific and gender-based approaches when facilitating border management. Particularly in relation to protection of children, it recognises affirmative action for taking into account the best interest of the child at international borders and for family reunification.

However, its reference to international human rights should not be overstated, because the way in which securitisation is interwoven into the Objective challenges the Compact's overall aim of achieving safe, orderly and regular migration. As such it refers to ensuring 'security' in border management policies and thus presumes a link between border crossing and safety of states. However, it is an unsound assumption that tighter border controls would lead to more orderly border crossings. On the contrary, people are pushed to embrace life-threatening routes to cross borders if they are not able to pass the barriers imposed by states. In this context, the Objective provides for such barriers – including imposing liability for air carriers to 'pre-report' passengers, resorting to pre-screening of passengers and to information technology in border controls.

The current practice on air carrier liabilities supports this insight. Accordingly, states impose obligations on air carriers to check the authenticity of documents of air travel passengers, to refuse boarding of those who cannot provide proper documentation, as well as to co-operate with border control authorities to identify passengers who might pose a security threat. Failure to fulfil those actions lead to sanctions for those carriers and liability for them to cover the costs of passengers' return. With air carriers serving as the second layer of border control before people even reach the border, those fleeing persecution might resort to unsafe routes and become targets of human smugglers and traffickers as they face the possibility of not being allowed to travel without required documents or visas (either because they were forced to flee without those documents, or because they cannot gather them without endangering their lives, or because those documents are not issued or are not recognised). Also, in practice, air carriers provide little assistance in helping passengers seeking to flee persecution and because the financial burden of allowing them to board outweighs assessing asylum claims, they deny boarding them. This increases the risk of *refoulement* performed by air carriers on behalf of states.

Overall, the Objective takes one step forward by making repeated references to the respect of human rights standards and adding an explicit reference to the protection of the right to privacy and data protection, but then it takes two steps back by framing border management in the security context. This is an ongoing dilemma of states' insistence on their sovereignty and security on one hand and their obligations to protect migrants, irrespective of their immigration status on the other. As discussed here, the Objective continues this dilemma.

<sup>1</sup> *S and Marper v The United Kingdom* [2008] ECHR 1581.

## Objective 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

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Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 5: *Ensure that all border governance measures protect human rights.*

### Introduction

Objective 12 aims to strengthen certainty and predictability in migration procedures via appropriate screening, assessment and referral. In its final form, it is much less ambitious, but much more streamlined than the original draft. Now it aims at ensuring that “migration procedures” will entail that appropriate and relevant information is communicated to all migrants and that victims of trafficking and “migrants in situations of vulnerability”, especially children, are identified early on in that procedure and get adequate attention and assistance, including referral to the competent, specialised institutions.

As with all other objectives, this one on screening, assessment and referral ought to be read in the context of the whole Compact, as procedural guarantees which are relevant at the border, at other entry points or whenever a migration procedure is started may appear in the context of other objectives. Eminently this is the case with detention that is the subject matter of Objective 13. Further important legal guarantees appear in the overarching principles of “rule of law and due process”, “human rights” and “child-sensitive” approach, listed in the Vision and Guiding Principles section of the Compact. Objective 5 suggests giving humanitarian visas to “migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations”; Objective 7 deals extensively with vulnerabilities of migrants and calls for ensuring that “migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them”. Objective 21 re-states the customary international law norm of *non-refoulement*. The broader context of smuggling and trafficking are “regulated” in Objectives 9 and 10 which also belong to the context of Objective 12.

### Comparison of the drafts: Possible protection gaps for the sake of notional purity

Objective 12 was the site of a monumental struggle to achieve consistency (and probably to please some negotiating states) without losing sight of the complexity of large-scale movements, involving asylum seekers (refugees) and others not eligible for international protection. This struggle is reflected in the extremely large number of changes over the six months of negotiations and the conceptual turn taken.

Unfortunately, no records of the negotiations are in the public domain so non-participants have no insight into the positions of the states and the justifications of the suggested amendments of the text. The website on the negotiation process does not reproduce the country statements, except for a few with limited importance. But it is telling that of the eleven substantive words constituting the title of the final text only two were part of it in the Zero Draft.

Two major conceptual turns took place during the negotiations. The first and most important is that the text as it stands tries to exclude persons in need of international protection, whereas the original text was still incorporating references to asylum seekers, refugees, and asylum. The Zero Draft was faithful to the New York Declaration for Refugees and Migrants which took a holistic view, underlined “the importance of a comprehensive approach to the issues involved” and declared that “we will ensure a people-centred, sensitive, humane, dignified, gender-responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants.” (Para 22) That position was reflected in the commitments listed in the declaration, applicable to both refugees and migrants.

Objective 12 excludes asylum seekers and refugees from its ambit. Para 4 of the Preamble states:

“Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection as defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions.”

So the Global Compact for Migration assumes that “refugees” (and others in need of international protection) are not migrants. That is acceptable within the Compact in so far as in principle refugees are covered by the Global Compact

on Refugees. However, in general this differentiation does not correspond to the understanding of the term 'migrant' in migration studies, demography, anthropology or sociology.

Theoretically the procedure leading to the recognition of refugee status or other form of international protection is different from all other procedures relating to the non-refugee migrants. Refugees (even when they are not yet recognised and therefore treated as asylum seekers) have a right not to be expelled, returned or rejected (refouled). That is a privilege those who do not seek international protection do not enjoy (though international human rights law remains applicable to all migrants, whether refugees or not). But, in practice, those who arrive irregularly comprise both groups, those in need of protection and those not. Therefore 'first responders' as they are referred to in the text must deal with 'both groups'. The conceptual difference between a refugee and a returnable irregular migrant does not show: they look alike.

The second conceptual turn led to the abandoning of the idea of 'status determination'. Whereas in March 2018 the chapeau of Objective 12 (para 27, then) of the Zero Plus draft still spoke of "mechanisms and procedures for the identification and status determination of all migrants, in order to ensure adequate and timely referral, and assistance at all stages of the migration cycle, as well as to distinguish clearly between migrants and refugees", the first full revision dropped the reference to status determination. However, the second revision at the end of May brought back the issue in a rather obscure language: "We commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective and protection-sensitive mechanisms for the adequate and timely screening and individual assessment of all migrants for the purpose of identifying and facilitating access to the appropriate determination and referral procedures, in particular where return would exacerbate risks and vulnerabilities, notably those recognized under international law." The meaning of 'protection-sensitive' 'assessment' for the purpose of access to 'determination procedures', where 'return' would 'exacerbate risks' of those with vulnerabilities 'recognised under international law', could simply mean an euphemistic description of the identification of those who apply for international protection. The text of the third revision later became the final version, dropping all connotation to refugee status determination.

The encounter with the potential asylum seeker is relegated to the weak language of subpara e), which obliges states to effectively communicate the rights and obligations 'on available forms of protection' in the context of mixed movements'. The term 'mixed movement' is only used twice in the text of the Compact, the other occurrence being in Objective 7 on vulnerabilities, so it remains unclear whether that was understood as including asylum seekers or not.

These conceptual transformations led to the only substantive change in the actions envisaged under Objective 12. Subpara a) of the Zero Draft considered instrumental to "[s]upport global efforts in situations of broader international protection challenges of mixed movements, such as the UNHCR asylum capacity support group, to promote effective and swift status determination, protection and referral of asylum seekers, refugees and migrants, including those displaced in the context of disasters and crisis". That is clear language, covering 'political' refugees, persons displaced by natural disasters and others in need of protection due to crisis. This text of the first action gradually gave way to tasks related to communicating requirements on entry, stay, work, study and other 'activities' and processing of applications fast and cheap, omitting any reference to UNHCR, asylum seekers and refugees.

The other three actions (subparas b), c) and d)) became a bit more refined in detail but retained their essential content. The first requires a broad range of actors from border guards to consular officers to assist in the identification and referral of victims of trafficking, migrants in situations of vulnerability, especially unaccompanied or separated children and smuggled persons subject to exploitation and abuse. The second calls for the establishment of gender responsive and child sensitive referral mechanisms applying standardised operating procedures. The third guarantees that children be treated as such and unaccompanied or separated children be referred to the appropriate institutions and get an impartial legal guardian, whereas in cases of children with family, the unity of the family be protected.

## The Future

Some of the criticism levelled against the Zero Draft seems to have been heard: the final text makes reference to culturally sensitive counselling and calls for training to recognise signs of trauma.

The major strength of the text is its intensive focus on persons with special needs or 'migrants in situations of vulnerability', reflecting in a compressed form ideas expressed in much more detail in the "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations" produced by the Global Group on Migration.

It is also laudable that the objective aims at producing certainty and predictability in all migration procedures, based on human rights and conducted in an effective, fast, individualised and non-costly way.

The objective sets useful standards in respect of the information to be made available for all migrants, including those awaiting return.

The challenge created by the objective's final formulation is that it concentrates on an important, but still relatively small subset of all the migrants subjected to 'screening assessment and referral'. In contrast to the guarantees concentrating on migrants with vulnerabilities and victims of trafficking, others, who may be in an irregular situation will hardly profit from these 'actions'. There is no word about civil society presence at the border or in these procedures. The objective remains fully silent about access to legal representation and the preconditions of free legal aid. No word is devoted to

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the interview situation, language, interpreters, or procedural rights in this early phase of the migration procedure. The reception conditions (housing, food, clothing, access to communication channels, to medical care etc.) of those not applying for international protection but being in an irregular situation are not addressed either.

The lack of clear rules of cross reference within the Global Compact and with the Compact on Refugees as well as the lack on reference to the existing relevant rules in other international legal instruments, including human rights treaties combined with the indeterminacy of some of the concepts used will decrease the guiding power of the objective. What if large numbers of persons appear at the border due to a sudden onset natural disaster as mentioned under para 21 g) of the Compact? What if a person expressly applies for asylum? Which provision of the Global Compact on Refugees should replace this objective and govern the actions of the first responders? Are principles 6 and 7 on screening, interviewing, identification and referral of the Recommended Principles and Guidelines on Human Rights at International Borders produced by the UN High Commissioner for Human Rights to be applied in case this objective offers no guidance?

The aspiration to achieve notional purity and remove almost everything related to international protection but at the same retaining indeterminacy about the real target group of this objective (is it only irregular migrants in situations of vulnerability or also potential job-seekers or students or all migrants?) may have produced a text which will have less impact than it was hoped for in light of the Zero Draft.



## Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives

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International Covenant on Civil and Political Rights, Article 9(1): *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

### Introduction

Objective 13 addresses the use of immigration detention and aims to ensure that detention is used only as a last resort when alternative measures are unavailable. Paragraph 29 sets out the key aims of Objective 13, each of which are to be achieved in line with due process and international human rights law. A number of key points can be made in relation to the commitments in paragraph 29. First, detention must abide by the rule of law. It must have a legal basis, and it must be necessary, proportionate and ordered on an individual basis. These safeguards help to ensure that detention is not arbitrary, and to prevent the automatic detention of whole classes of individuals, such as foreign national offenders or asylum seekers. Second, the protections afforded by Objective 13 apply to all types of immigration detention, whether it be at a state's borders upon arrival, or within the interior in the context of removal or deportation. Third, there is a strong commitment to the prioritisation of noncustodial alternatives to detention with a view toward using detention only as a last resort. Several actions are proposed to achieve Objective 13. Though some of them originated in the Zero Draft and have survived the negotiation process, a number of important changes, both positive and negative, have occurred. Some of these will be discussed in the following section.

### The Evolution of Objective 13

In general, the final version of Objective 13 is stronger than originally proposed in the Zero Draft. From the outset, Objective 13 included important provisions, such as the requirement that detention be non-arbitrary, necessary and proportionate; that it be ordered on an individual basis; and that it must be as short as possible. There were also a number of negative aspects. This included, for example, a lack of access to justice provisions (other than the right to communicate with a lawyer); a failure to require periodic reviews of the appropriateness of detention; no requirement that detention take place only in specialised facilities (though the importance of keeping immigration detainees separate from criminal detainees was acknowledged); and finally, though detention is to be for the "shortest period of time", the Zero Draft did not promote the need to establish a maximum period of detention by law. As the negotiations evolved and subsequent versions of Objective 13 were published, a number of improvements were made. A right of access to legal representation was introduced in Revision 1. It specified that access to legal 'orientation' and representation must be granted "in full compliance with international human rights law" (para (e)). The term 'orientation' is a vague concept. Presumably, it refers to the need to inform individuals of the applicable law and their legal rights and obligations, but this is unclear. Ambiguity surrounding its meaning may lead to varied interpretations of the Objective which could result in a low standard of protection. Though the Zero Draft had included a right to communicate with legal representatives, this revision further underscored the commitment to non-arbitrariness in paragraph 29. This survives the final text of Objective 13 in paragraph (f). The most important amendments came with Revision 2. First, a number of organisational changes were made. For example, the requirement that detention be for the shortest possible period of time was moved up from what was paragraph (e) in the Zero Draft, to the headline paragraph 29. In addition, a new commitment to the prioritisation of non-custodial alternatives to detention was introduced into paragraph 29. The inclusion of these concepts into paragraph 29 gives them more prominence and reflects the importance that is attached to them. Second, there were also substantive changes made in Revision 2. A new requirement that domestic monitoring of immigration detention must be conducted by an independent body was included in what is now paragraph (a) of the final text. This amendment underscores the rule of law notion that the state must be accountable for its actions and cannot monitor itself. The language in what is now paragraph (c) concerning the need to review and revise domestic immigration detention law was made much stronger with the introduction of substantive legislative requirements aimed at ensuring that detention cannot be ordered on an arbitrary basis. Revision 2 also introduced a paragraph on access to justice (paragraph (d) in the final text), which retained the former requirement that detainees be given the right to communicate with their legal representation, but added a requirement that states must ensure that free or affordable legal advice be provided. That same paragraph also introduced the right to regular review of a detention order. Finally, in what is now paragraph (e), Revision 2 introduced the obligation to provide detainees with the reasons for their detention in a language they understand. Revision 3 brought with it three main changes. First, the idea that the state and any private actors charged with administering immigration detention, such as private contractors operating detention centres, should be held accountable for human rights violations. This is in paragraph (g) of the final text. Second, the notion that any detention must comply with due process was brought into paragraph 29, underscoring its importance in a way similar to the textual changes described above in relation to Revision 2. The third change was to downgrade the access to justice provisions introduced by Revision 2 by removing the requirement

that states “ensure free or affordable legal advice” and replacing it with a requirement to “facilitate access to free or affordable legal advice”. Though this language obliges states to put suitable processes and mechanisms in place, its language is weaker in that it does not also require states to ensure that such processes are working properly. While acknowledging the positive inroads that were made during negotiations, it is also important to outline some of the main drawbacks of Objective 13 which have persisted into the final text. To reiterate a first point here, there is no obligation on states to develop a statutory maximum period of detention. Without such a limit, detention can potentially be indefinite, especially if strict processes are not in place to ensure that detention remains necessary and proportionate in the individual circumstance. Linked to this is the need to engage in periodic reviews of detention. Though Objective 13 provides for such reviews, it is unclear whether they must take place automatically, which is preferable, or whether they depend on the initiative of detainees. These reviews should also be used to ensure that the state is acting diligently in its pursuit to exclude, remove or deport the individual in question. Second, while it is good to see the introduction of accountability for human rights violations, it should be accompanied by provisions requiring compensation to the victims of such breaches. The compensation should be proportionate to the violation and could be dealt with by domestic law on liability, such as tort law. Third, the failure of Objective 13 to require detention to take place only in specialised facilities cuts against the idea in paragraph (c) that detention should not be used as a deterrent. Though previous versions of Objective 13 included language to the effect that detention should be “non-punitive” as well as separate from criminals, this language was removed in Revision 2, which is unfortunate, and which goes against recommendations from international organisations, including the UN High Commissioner for Human Rights and the UN Working Group on Arbitrary Detention, that detention take place in specialised facilities.

## The Future

With the above in mind, Objective 13 is quite a strong and positive statement of the standards that should apply to immigration detention. In particular, its great emphasis on the need to prioritise non-custodial alternatives to detention underscores the notion that detention should be used only as a last resort. In addition, Objective 13 demonstrates a strong commitment to due process, which is evidenced in provisions requiring the right to reasons for detention, the right to legal representation, and the right to have detention reviewed regularly. In a similar vein, its provisions concerning access to justice, though slightly watered down from previous iterations, are to be welcomed. Finally, the notion that states must be held accountable for violations of human rights suffered by detainees is a vital component of effective access to justice, though this could be made stronger to provide compensation for such breaches. Objective 13, therefore, looks promising on paper. But a number of challenges lie ahead with regard to implementation. One of the main tasks will be to give effect to the requirement in paragraph (g) that those who administer immigration detention be trained on non-discrimination, the prevention of arbitrary arrest and detention in the context of international migration law. Many states will not have resources readily available for this and will likely look to regional and international organisations for assistance not only in terms of substance, but with regard to financial support for the training. In addition, depending on how the access to justice provisions in paragraph (e) are interpreted, legal and financial resources will have to be dedicated to helping detainees obtain legal advice and legal representation. States without developed legal aid systems may particularly struggle with this aspect of the Objective. Finally, in view of the great emphasis on the development and prioritisation of non-custodial alternatives to detention, including the creation of a comprehensive repository of best practice in relation to alternatives in paragraph (b), a substantial amount of resources, both in terms of personnel and money, will be required to create the database and contribute to its development. It is key that some sort of co-operative mechanism be developed to ensure regular and sustained communication between the stakeholders in this regard, and perhaps more broadly in relation to the implementation of Objective 13 as a whole.

## Objective 14: Enhance consular protection, assistance and cooperation throughout the migration cycle

Stefanie Grant (Independent Researcher)

Article 5, Vienna Convention on Consular Relations [VCCR]. '*Consular functions consist in... protecting in the receiving state the interests of the sending State and of its nationals...*'

Article 23, International Convention on the Rights of Migrant Workers [ICMW]. '*Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired...*'

### What does the Objective address?

The New York Declaration and the UN Global Compact on Migration together re-state the role of consular protection in the context of contemporary international migration.

The New York Declaration gives priority to consular protection as a means of 'safeguarding the rights of, protecting the interests of and assisting' migrant communities, in accordance with relevant international law [Para. 42]. Objective 14 of the Compact commits states to 'strengthen consular protection ...in order to better safeguard the rights and interests of *all* migrants at *all* times' [emphasis added], in accordance with international law.

Objective 14 takes as its starting point the traditional right of states to provide diplomatic and consular protection to their citizens when they are abroad. It goes on to recognise a wider duty to protect individual rights through consular cooperation between states, in accordance with international law. Read together with references to consular protection elsewhere in the Compact [Objectives 7, 8, 13 and 21], Objective 14 addresses the urgent question of how consular institutions can respond to challenges inherent in contemporary migration, including the fact that many of the most vulnerable migrants, and not only those who are legally stateless, lack a state of nationality which is able and willing to provide effective protection. The Compact goes some way towards addressing this significant protection gap through pledging collective action. States thus accept a double commitment: to protect their own nationals, and to step in where other states are unable to provide protection for their citizens, including in emergency or conflict situations. Thus, an EU citizen who is in a country outside the EU where his/her own national state has no representation is entitled to protection by the diplomatic or consular authorities of any other EU country. [Council Directive (EU) 2015/637 of 20 April 2015]

Protection by a migrant's home state is an important and much older – but often overlooked – adjunct to individual protection under human rights law. Consular protection is rooted in the 1963 Vienna Convention on Consular Relations ['VCCR']. The Convention is not listed in the Preamble to the Compact, except by inference as part of international law; the omission is surprising since the Convention has been ratified by most UN member states and reflects international customary law. It recognises the right – although not the legal duty – of states to protect their citizens abroad through consular actions [Art. 36]. Unlike international human rights law, the right is that of the state, not the individual, and is discretionary.

In the years since the VCCR was adopted, international human rights treaty law has recognised individuals as rights-bearers, and now requires states to protect individuals within their jurisdiction regardless of nationality. The two regimes – consular protection under international law, and individual protection under international human rights law – are essentially complementary. In practice they have operated on separate and parallel tracks, and consular protection is often neglected in discussions of migrants' human rights. The Global Compact goes some way to redressing this imbalance by asserting the contemporary relevance of consular protection, and the need to strengthen it.

### Commitments and Actions

Through Objective 14, states have committed to: 'strengthen consular protection of and assistance to our nationals abroad, as well as consular cooperation between States in order to better safeguard the rights and interests of all migrants at all times, and to build upon the functions of consular missions to enhance interactions between migrants and State authorities of countries of origin, transit and destination, in accordance with international law' [Para 30].

Six actions are listed:

1. Co-operation between states where individual states lack capacity.
2. Information exchange to contribute to policy development.
3. Bilateral or regional agreements where states have no consular presence.



4. Strengthened consular capacities in order to identify, protect and assist 'our nationals abroad' who are in a situation of vulnerability, by providing rights training to consular officers.
5. Consular registration to facilitate assistance to migrants in emergency situations, including through helplines and national digital data bases.
6. Advice on local laws and customs, interaction with authorities, financial inclusion, and business establishment, and issuing travel documents, and consular identity documents.

In the main, these actions reflect accepted consular practice, although (4) describes a more active role in situations where nationals are victims – of human and labour rights violations or abuse, of crime, trafficking in persons, migrants who are subject to smuggling under aggravating circumstances, and migrant workers exploited in the process of recruitment. While the prescribed action is only to train consular officers in 'human rights-based, gender-responsive and child-sensitive actions', protective action must logically follow.

Consular protection is instrumental in other Objectives of the GCM.

- Objective 8: where migrants die or are missing on migratory journeys, actions include assistance to migrants to communicate with their families and families to search for missing relatives, especially in the case of unaccompanied children; and establishment by states of transnational coordination channels, including consular cooperation, for families looking for missing migrants.
- Objective 13: actions include ensuring 'that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, ...in accordance with international law and due process guarantees'. [O.13(e)] There is an implicit, if unstated, role for the consul in relation to access to justice, independent legal advice, food, healthcare and information [O.13(d) & (f)].

Consular assistance is here presented as a right of the individual. This reflects the advisory position of the Inter American Court of Human Rights which has interpreted the VCCR [Art. 36] as conferring a right to consular assistance on detained foreign nationals; 'the right to information allows the right to the due process of law [Art 14, International Covenant on Civil and Political Rights] to have practical effect'. Failure to observe the right to information is prejudicial to the due process of law. [O.C.- 16/99 of 1 October 1999]. Similarly, the ICMW [Article 16(7)] contains a right to communicate with consular authorities.

- Objective 21(d): consular officers to assist in the return process with documentation and 'other services' in order to 'ensure' – inter alia – 'safety and dignity in return'.

While the text of Objective 21 does not specify an active role for consuls in ensuring specific rights in the return process – e.g. in relation to determining the best interests of the child – this is a logical inference, made stronger by the fact that in almost all situations both the migrant's country of nationality and the country of destination will be parties to the CRC, and so equally bound to consider the child's best interests.

Consular protection is also instrumental in other Objectives, notably,

- Objective 3: providing legal guidance on rights, national laws, and access to justice.
- Objective 4: ensuring that 'all' migrants have proof of legal identity and adequate documentation.
- Objective 6: actions to ensuring decent work logically engage consular officers where, for example, travel and identity documents are confiscated, or where migrants seek to obtain redress after exploitation, abuse or rights violations, or to participate in legal proceedings. This expands a consul's role [O.14(d)] in identifying and protecting victims of abuse and migrant workers exploited in the process of recruitment.

Changes to Objective 14 during the negotiations were minor, with one exception. Action (d) refers to situations where nationals are victims of a range of rights violations. The zero draft was amended in ways which both limited and expanded its scope. On the one hand, the final draft narrowed protection to 'our nationals abroad', replacing the broader term 'migrants' which could have implied a wider duty. On the other hand, the final draft adds the word 'protection', and significantly expands the list of situations of vulnerability by including 'victims of human and labour rights violations', and exploitation in the process of recruitment. This suggests contradictory pressures on the negotiators: national sovereignty vs universality of rights and the imperatives of international protection.

## The Future

The Compact positively restates the institution of consular protection as a means of collectively protecting the human rights of all migrants at all times. It presents protection as both a duty of states, and a right of individuals. By omitting reference to the VCCR, the Compact makes it harder for states to refuse protection on the ground that it is within their discretion.

In policy terms, the Compact reflects the Sutherland Report's recommendation that migrants 'regardless of their nationality, should have access to quality consular protection and assistance in transit'. [Sutherland Report, UN Doc. A/71/728, para 53]. It attempts to address the inverse relationship which often exists between the number of a country's migrants, and the presence of consulates in the countries where the most vulnerable are to be found. To this end, states have committed to co-operate so that consular services can be provided collectively, where individual states lack consulates in a particular country.

Set against this, one gap and one challenge should be mentioned.

Consular protection is of no use to stateless persons who have no states of nationality or consuls to whom they can turn. A comparable protection and assistance regime is needed for this most vulnerable population. This is a major protection gap, which the Compact does not address.

Second, the scope of consular protection should now be redefined to reflect international human rights law in situations where sending and receiving states have concurrent obligations under treaties which protect the most vulnerable migrants, including the Convention on the Rights of the Child or the Convention on the Elimination of all Discrimination Against Women. There must surely be a presumption that the actions of consuls should seek to protect the rights contained in a treaty to which both states are parties: thus, where a child is in need of protection, a consul should work with the national authorities of the receiving state to ensure that the child's best interests are a primary consideration in any decision [CRC. Article 3]. This question did not arise when the consular protection regime was codified in the VCCR. But the subsequent development of international human rights law has created a need – long overdue – to clarify the relationship between these two bodies of international law. This is an important and interesting challenge if the promise of the Compact is to be realised.

## Objective 15: Provide access to basic services for migrants

*Bethany Hastie (University of British Columbia)*

International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 11(1): *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

ICESCR, Article 2(2): *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### Introduction

Objective 15 aims to ensure that all migrants, regardless of migration status, have access to basic services. This objective carries forward the rights contained in international human rights law, including especially in the ICESCR, which delineates rights to housing, health care, and education, and requires states to guarantee such rights in a non-discriminatory manner.

Migrants are often either formally or practically excluded from access to basic services, including health care, education, housing, legal aid, social benefits such as employment insurance, protection of law enforcement bodies, labour organizations, and others. They are often subject to continuing discrimination under law and in practice, increasing the difficulty of accessing basic services. Immigration policies and practices in countries across the globe have targeted hospitals, schools and similar locations for enforcement operations, exacerbating the risks migrants face in accessing basic services. These issues have been documented by policy organizations, scholars, and international bodies, and efforts to address these issues through legislation and policy have been undertaken, such as by the European Commission against Racism and Intolerance.

Objective 15 sets out general recommendations to reduce the legal and social barriers migrant workers face in accessing basic services, and to improve access, including by: ensuring non-discriminatory treatment under the law; ensuring that cooperation *with* immigration authorities does not exacerbate the vulnerability of migrants; establishing accessible access points for services that are inclusive and non-discriminatory; and, establishing a national mechanism for complaints and monitoring. Objective 15 also makes specific recommendations regarding access to health care and education, communicating heightened importance in relation to those two services.

### Changes to Objective 15 over the course of negotiations

In the course of negotiations and drafts of the Global Compact, several changes have been made under Objective 15. Most significantly, the objective has moved substantially on the position communicated about cooperation with immigration authorities. The original draft of the text specifically encouraged a separation of service delivery from immigration authorities, and recommended the creation of “firewalls” to prohibit information sharing between these bodies. This was significant as the fear of denunciation and deportation is a major barrier for migrants accessing basic services.

The concept of “firewalls” protects irregularly present migrants in particular, who may desire or need access to public services, by prohibiting the sharing of client information with other public bodies, notably immigration authorities. Firewalls may be achieved through policies that prohibit information sharing, prohibit reporting to immigration authorities, or prohibit access to client information by immigration authorities.

By specifically recommending the separation of service delivery from immigration authorities through the use of “firewalls”, the original text of Objective 15 created an opportunity for meaningful access to services for migrants. However, the final draft of the Global Compact removes not only the language of “firewalls” from Objective 15, but any recommendation regarding the separation of service delivery from immigration authorities. Instead, the objective acknowledges the reality of on-going cooperation with immigration authorities, only recommending that such cooperation be done in a manner that will not exacerbate the vulnerability of migrants “by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of the person at places of basic service delivery.”

While this wording may enable states to interpret the recommendation in manner that will encourage some “firewall” activity, such as through the mention of rights to privacy, liberty and security of the person, it does not possess the strength and clarity of the original draft, which more assertively recommended the separation of service delivery from immigration and related bodies. As a result, the final text regarding cooperation with immigration authorities renders much of the remaining recommendations of the objective impractical, as cooperation with immigration authorities is known to be one of the most significant deterrents for migrants to seek out and access services.

A second shortcoming of Objective 15 relates to its silence on the array of basic services to which the recommendations should apply. While the objective highlights health care and education, there are many basic and public services to which migrants need formal and practical access. These include: housing; labour bodies; legal aid; courts; law enforcement; and, social assistance, amongst others. By neglecting to explicitly reference these additional service needs, Objective 15 fails to fully appreciate the interconnected needs and experiences that migrants have, and which require access to a broad array of services.

Migrants are known to face discriminatory treatment in accessing many basic services, especially in relation to housing, and may also be formally excluded from entitlement to services such as legal aid. In addition, the possibility of denunciation often prevents irregularly present migrants from approaching labour bodies when they are experiencing abuse in the workplace, and similarly from approaching law enforcement and courts where they are victims of crime or experience other legal problems. By highlighting only health care and education as specific services in the text, Objective 15 risks states focusing exclusively on these services to the neglect of many others that migrants need access to.

The text of Objective 15 did positively evolve in respect of the recommendation concerning non-discriminatory treatment of migrants. As citizenship status may often be used as a disguise for discriminatory treatment, addressing this issue is urgent in order to enhance access to basic services for migrants. The original text of Objective 15 recommended states to enact laws that explicitly prohibit discrimination on a number of grounds. Over the course of the negotiations, several grounds were added, which has resulted in a final text that is more inclusive of the various identity characteristics that may be targeted for discriminatory treatment in law and practice: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, and, disability.

The recommendation concerning non-discrimination has been further revised to encourage states to ensure that service delivery does not amount to discrimination “irrespective of cases where differential provision of services based on migrant status might apply.” In other words, this recommendation calls on states to ensure that migrant status is not used as a proxy or disguise for discriminatory treatment on other bases. This is important to explicitly communicate given that migration status is known to be used in this manner, and thus creates barriers for migrants to access services.

Overall, the final text of Objective 15 does some important work towards achieving safe, orderly and regular migration in a global context. Fundamentally, it calls on states to ensure that all persons subject to its jurisdiction have access to basic services, such as health care and education, regardless of migration status. This affirms the basic human rights that all persons possess under international law, and emphasizes the need for practical access alongside formal legal entitlement. Given the widely documented barriers and exclusions migrants face in accessing basic services, it is a strength of the Compact to include a specific objective targeted towards reducing these barriers and challenges.

## The Future

Implementation challenges will likely arise in identifying concrete steps to improve access in relation to basic services. First, as noted earlier, many services are not specifically detailed in the recommendations, including housing, legal aid, access to courts, social security and assistance, and others. It will not be clear what basic services should be targeted for implementation of the recommendations made under Objective 15 beyond the limited recommendations made in respect of health care and education. The recommendations further fail to set out concrete steps for states to enhance service delivery at a general level, although some steps can be deduced from other pieces of the text, such as ensuring necessary language services, such as translators, are available for communication purposes.

The specific guidance provided regarding health care and education may lead to efficient and effective implementation of the objective in respect of those two services. For example, the recommendations point to the need to reduce communication barriers in health care delivery, and references the existing international World Health Organization framework as a starting point for states to implement and strengthen health care delivery for migrants. Relatedly, the recommendations concerning education explicitly identify the multiple sites and levels of educational activity to which migrants should be given access, including not only early childhood education, but also vocational training.

Monitoring and investigations will also likely be hampered, due in part to the removal of recommendations concerning firewalls. As noted earlier, the possibility of denunciation is a significant deterrent to migrants accessing services. It is also known to be a significant deterrent in migrants voicing complaints or approaching institutions when their rights are being violated. As such, even where a monitoring and investigation body is established, as recommended by Objective 15, it will be challenging for such a body to be effective.

# Objective 16: Empower migrants and societies to realise full inclusion and social cohesion

Ulrike Brandl (University of Salzburg)

## Article 2, International Covenant on Economic, Social and Cultural Rights:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

...

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

## Introduction

The overall purpose of Objective 16 is to foster inclusive and cohesive societies. The objective enumerates nine actions, which intend to empower migrants but also address receiving societies.

The objective seeks to improve the welfare of all members of society. In order to reach this target, disparities and conflicts should be minimised and polarisation avoided. Migrants should be empowered to become active members of the receiving society and enhance its prosperity. Contributions of migrants should be made more visible to increase public awareness about the positive impact of migration.

All members of societies should have confidence in policies and institutions relating to migrants. Both, migrants and receiving communities should exercise their obligations towards each other.

In the following commentary I focus on the actions enumerated in Objective 16 and the responsibility of States to guarantee economic, social and cultural rights to all persons under their jurisdiction. I will also highlight the evolution of Objective 16 and refer to several changes in the text during the drafting process. I continue with a discussion of the future of the objective and refer to challenges that might impact its realisation.

Full inclusion and social cohesion strongly depend on the effective guarantee of economic, social and cultural rights to all members of societies including migrants. Economic, social and cultural rights as second generation human rights are fundamental elements of international human rights obligations. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is both part of the International Bill of Human Rights and at the core of the universal human rights system. Regional human rights conventions on social and economic rights also enhance rights of all members of society. In general, these rights have to be guaranteed to nationals and non-nationals. **Article 2 paragraph 3 ICESCR only allows the following restriction:** developing countries may determine to what extent they would guarantee the economic rights recognised in the Covenant to non-nationals with due regard to human rights and their national economy. Most articles guaranteeing rights start with the wording "States Parties to the present Covenant recognise the right of everyone ..." and do not allow restrictions with regard to non-nationals.

The denial or the unjustified restriction of social and economic rights to migrants violates their human rights and has a negative impact on their ability to contribute to the prosperity of the receiving society. A further consequence is that migrants do not receive adequate protection against abuse. This potential danger is especially to be found in the areas of exploitation of migrant workers and their families and with regard to access to health care and access to education.

Guaranteeing economic, social and cultural rights makes migrants full members of societies, leads to their inclusion and avoids their becoming invisible. It avoids the "othering" of migrants in general and specifically of vulnerable groups of migrants including migrant children.

The denial of rights might also lead to an increase in the vulnerability of migrants. Not every migrant is per se vulnerable, but many are as they are outside their country of origin, they need to adapt to the new living conditions and to follow the integration requirements as demanded by the host state. This vulnerability can be aggravated by personal circumstances such as childhood, health status or other reasons.

Objective 16 speaks about inclusive and cohesive societies and also uses the term integration, but does not refer to the more neutral term social cohesion, instead using 'social inclusion'. It is not detectable from the drafting history of the text versions whether the use of other terms was discussed.



## Evolution of Objective 16

Paragraph 32 of the Global Compact for Migration (GCM) is more ambitious and contains more actions with concrete aims than Annex II of General Assembly Resolution (New York Declaration for Refugees and Migrants, A/RES/71/1). Annex II with the title "Towards a global compact for safe, orderly and regular migration" already enumerated several targets with regard to integration, such as o) Promotion, as appropriate, of the inclusion of migrants in host societies, access to basic services for migrants and gender-responsive services; (p) Consideration of policies to regularise the status of migrants.

The actions enumerated under the Chapeau of paragraph 32 contain considerable improvements with regard to the clarity of the actions and the terminology. Objective 16 of the Final Draft of the GCM pushes the New York Declaration forward.

Some actions enumerated in Objective 16 remained fairly constant throughout the drafting process, while others were amended considerably. The number of specific action points was reduced from eleven to nine. The Zero draft, the Zero Draft plus and Rev. 1 enumerated eleven actions (points a) to k)). In Rev. 2 the number of actions was reduced to nine (points a) to i)). Rev. 2 also brought a considerable change in the sequence and content of the actions.

In the Zero Draft eleven actions were considered as instrumental for reaching the objective. The first action promoted participation of States in the Migrant Integration Policy Index. This action aimed to make good practices and also make challenges visible. Participation in the Index should lead to greater transparency. The Final Draft however does not refer to this action. In Rev. 2 participation by states in the Migrant Integration Policy Index was eliminated. This might be based on the weakness of indexing integration properly as integration is hard to measure. The elimination however also reduces transparency.

The second action targets the exchange of policy experiences, especially best practices on ways to recognise migrants' identities and also on means to promote the customs and traditions of local communities. This aim is also included in the Final Draft, but with a different wording. This change intends to create a mutual respect for customs, traditions and cultures of both societies. The change is certainly an improvement as it addresses both sides and does not only refer to the respect of migrants' identities.

The action to develop short, medium and long-term policy goals to foster the integration of migrants remained as a separate action. Inclusion with regard to political participation was mentioned in the Zero Draft, but already deleted in the Zero Draft Plus.

The action to develop holistic pre-departure programmes was formulated in the Zero Draft, but then deleted as a separate action. It seems that states did not see a need to formulate a separate action in preparation for migration as this could have an impact on countries of origin as well. Pre-departure programmes were finally included in Action b) combined with post-arrival programmes. The programmes should all be comprehensive and needs-based and may also include obligations and rights. The reference to holistic programmes was deleted. Basic language training may be required as well as orientation about social norms and customs in the receiving country.

Action f) was included in order to empower migrant women specifically. The Zero Draft referred only to non-discrimination against women with regard to employment, the right to associate and access to services, as measures to guarantee full and equal participation in society. In Rev. 2 the rights of women were strengthened again by the inclusion of measures to promote their leadership. The focus on empowerment of women is certainly an improvement. The special reference to empowerment of women should not lead to the conclusion that only women should be empowered but also other groups. Minors, elderly people, persons with disabilities and other vulnerable groups should have the possibility to receive special measures as well.

The action to work towards inclusive labour markets remained, but was reformulated. The zero Draft referred to access to jobs for which migrants are most qualified and to full participation of migrant workers in the in the formal economy. The Final Draft refers to decent work and thus sets a focus on the quality of work, which is certainly an improvement.

Actions f) to i) in the Final Draft refer to integration measures. Changes were made in key points. In action g) the terminology was amended from access to regularisation options to access to procedures towards residence status and enumerating groups of migrants. The latter term is the regular procedure for a residence permit, whereas regularisation is more often used for persons staying illegally but getting a status later on.

The establishment of community centres at the local level has been included in all texts with slight amendments. Action h) refers to the support of multicultural activities and Action i) enumerates targets for integration of children in the school- and education-system in the receiving society.

## The Future

Objective 16 has great potential to enhance integration and create social cohesion as the actions target both, migrants and the receiving communities. It enumerates a number of actions designed to promote integration and to bring migrants and members of the receiving society together. The focus on integration into the labour market is of course a key element of orderly and regular migration. The reference to decent work is certainly an improvement which was elaborated in the drafting process.



The objective specifically points to the rights of migrant women but does not explicitly mention children. Vulnerable groups are not covered by specific actions either. Though this lack does not necessarily mean that these groups are not targeted by specific measures, it is a shortcoming and reduces the comprehensiveness of the objective.

Objective 16 does not refer to specific integration measures. As these measures vary according to the objectives of a state's integration policy "between the poles of assimilation and multiculturalism", it would be useful to require that states offer integration measures that do not require assimilation but only respect of local customs and rules. The text of Objective 16 regularly refers to the rights of migrants and the situation in receiving communities in order to reach a balance between both aspects.

Integration requirements may result in excluding persons from migration and may e.g. build an impediment for family reunification. Thus strict requirements without allowing exceptions should be reduced to a minimum and allow the assessment of the personal and family situation.

There is no explicit reference to the binding nature of economic, social and cultural rights and to states obligations deriving from treaties. As this is a general feature of the GCM it is of course acceptable.

Objective 16 does not refer to information as this is the target of Objective 3. Pre-departure programmes as mentioned in paragraph b) require that the information in the pre-departure phase is accurate (see Objective 3).

The reference to short, medium and long-term integration is a positive aspect and integration requires a multi-faceted approach. Points f) to e) have a focus on local integration and on measures which have the aim to bring migrants and the local population into contact and improve conversation, business relations and enhance multiculturalism.

The Final Draft does not refer to inclusion with regard to political participation. This may result in an exclusion of migrants from civic and political participation. There would be various forms of participation beyond voting rights which would create a certain form of representation of migrants in the in the decision making process in the receiving states and communities.

## Objective 17: Eliminate all forms of discrimination and promote fact-based public discourse to shape perceptions of migration

*Kathryn Allinson (QMUL)*

International Covenant on Civil and Political Rights, Article 2(1): *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### Introduction

The overall purpose of objective 17 is the eradication of all forms of discrimination against migrants. The general principles of equality and non-discrimination are fundamental elements of international human rights law and must underpin any commitment to improving global migration. Discrimination is the basis of migrant vulnerability because it undermines their access to human rights protection and pushes them into a position of invisibility. Refusals of admission or removal based upon status are inherently discriminatory; such decisions are based on the 'otherness' of the migrant. It is this conditionality that makes the migrant vulnerable and it is this vulnerability that leads them to accept limitations on their wider gamut of rights (see Guild, Grant and Groenendijk, 2017). States justify this denial of rights by differentiating between migrants and citizens, where no such difference is permitted under international law as outlined in Article 2 of ICCPR, Article 2 CEDAW, Article 2 ICERD and HRC Gen Comm No 15 (1986) on the Conditions of Aliens.

Objective 17 is two-fold. Firstly, it focuses on eliminating discriminatory practises however they may manifest themselves. It highlights the essential role that conformity with international human rights law plays in eradicating discrimination. Secondly, the objective commits to improving public discourse surrounding migration in order to promote a 'more realistic, humane and constructive perception' of migration. In aiming to improve public perception of migration, the GCM seeks to stem the underlying source of racism and discrimination.

The first part of this objective and its corresponding actions speak more directly to the State's role in overcoming discrimination by penalizing hate crime (para a), ending racial profiling (para d) and providing access to complaint and redress mechanisms (para e). This requires the State to ensure a system exists wherein people who perpetrate hate crimes are held accountable, where migrants can access accountability mechanisms and they aren't systematically discriminated against through racial profiling. However, in addition to these operational aspects, under international law States must also fully protect the human rights of migrants regardless of their status and without discrimination. This central and fundamental aspect of eliminating discrimination is absent from Objective 17.

By contrast the second part of the objective to promote a positive public discourse around migration speaks more to the role to be played by migrants (para b), the media (para c), communities (para f) and community leaders (para g). These aspects of eliminating discrimination fall to the local and individual level guided, but not necessarily actioned, by States. In para b migrants are to be empowered to 'denounce acts of incitement to violence'. In para c the media, having been 'sensitized and educated' will 'promote independent, objective and quality reporting'. In para f communities will have awareness raising campaigns to inform them of the positive contributions of migration. Finally, in para g, migrants, political, religious and community leaders will detect and prevent incidences of discrimination. It should be noted that the promotion of a public discourse around migration is not to be conducted at the expense of freedom of expression (para 33).

### Evolution of Objective 17

The core elements of Objective 17 remained fairly constant throughout the drafting process. However, some linguistic changes were made at key points either strengthening or weakening the protection provided and some additions were made. In particular, there was a substantial scaling back of some of the language and provisions in Revision 2; however, within Revision 3 much of this 'damage' was undone or lessened. There were no changes made to the text between Revision 3 and Revision 4 suggesting that States were in agreement on the text of Article 17 at that point. The key changes will be briefly explored.

The Chapeau in para 33 elaborates on the objective with a number of specific commitments for States. Revision 1 saw the inclusion of 'violence' as a listed act of 'discrimination' elaborating on the ways in which racism can manifest itself. Revision 2 expanded target groups re discrimination to: race, ethnicity, nationality, gender, religion, or belief. However, it also included the caveat that this objective is in line with freedom of expression. This ensures that the obligation of non-discrimination does not undermine the freedom to express oneself, thus protecting the careful interplay between

sometime conflicting human rights. However, balance must work both ways and freedom of expression must not descend into racist or xenophobic discourse justified by an individual's right to share their views.

Para 33(a) was largely unchanged throughout the drafting process. Between Revision 1 and 2 the drafts positively included 'other acts of violence that target migrants, as well as providing medical, legal and psycho-social assistance for victims.' The broad scope of 33(a) means that its provisions will apply to any manifestation of hate crimes.

The only substantial change made to Para 33(b) was seen in Revision 2, which had included a dedicated section on empowering migrants to denounce acts of violence. However, the word 'punish' of perpetrators is gone and now accountability of those who 'actively participate' in such acts is limited to the 'commission of hate crimes' rather than wider violence. This reduction of criminal accountability is worrying, as is the caveat that this be done in accordance with the right to freedom of expression. Though this right must also be safeguarded, this provision looks to limit protection from racist violence.

Para 33(c) focuses on the role of the media in promoting a positive public discourse on migration. We have seen a switchback regarding the use of public funding of racist media outlets. In Revision 1 'restricting' was changed to the much weaker 'discouraging' at what would appear to be the result of pressure from the private sector, which is disappointing, given that the aim of this objective is to reduce racism and discrimination. This became 'avoiding' in Revision 2, but thankfully in Revision 3 it was changed to 'stopping'. This all appears to strengthen very much the commitment to reducing the promotion of negative rhetoric in the media. However, a new final caveat to this is in 'full respect of freedom of the media.' While this of utmost importance, it demonstrates a clear compromise amongst State parties and the private sector and media.

Para 32(d) in Revision 1 saw the positive inclusion of 'and all other forms of discrimination' and 'effective complaint and redress' mechanisms being further elaborated, and the methods of discrimination being left wide to include potential ways not elucidated. There was also the loss of 'migrant' regarding access to redress mechanisms but this appears to keep the provisions purposefully wide so an organisation or NGO etc. may act on behalf of the migrant. However, this could also be interpreted as excluding the migrant from the narrative.

In Zero draft plus para 32(e) includes 'national' (as well as regional) 'redress' mechanisms which highlights the role of the State in ensuring accountability and goes further than mere accountability by highlighting the need to 'redress' such discriminatory acts. Revision 2 changes from reducing barriers to 'provision of access' in an apparent strengthening of protection and it also highlights the necessity of protecting migrant women.

Revision 1 includes a new para 32(f) that focuses on awareness raising campaigns to inform public perceptions based on evidence and facts to challenge negative stigmatization of migrants. This is a positive step and informs how the States intend to change this narrative. However, in Revision 2 this includes a worrying reference to countries of 'return'. This implies that at any point a migrant may be subject to voluntary, but also forced, return to their country of origin. As a document intended to promote migration, such a reference could undermine the purpose of the GCM caveating any stay with the threat of removal. By Revision 3 'return' has been removed, however, the positive contributions migrants can make are now limited to those who are 'safe, orderly and regular', caveating the types of migration that is positive, and not subject to return. As such, the conditional nature of a migrant's stay and ability to contribute positivity remains.

In Revision 1 para 32(g) sees 'empower' changed to 'engage', which makes the role of community leaders and others seem passive, but does, however, demonstrate a role for the State. Revision 2 makes specific reference to promoting respect, 'in the context of electoral campaigns' which ensures representation of migrants within national, regional and local level governance.

## The Future

It is important to highlight that Principle 6 of the GCM guiding principles is 'Non-Discrimination' which ensures that non-discrimination underpins all the objectives and, in theory, the implementation of the GCM. Non-discrimination is also mentioned in objective 13 relating to detention, in objective 15 in relation to access to social services and objective 16(d) to promote inclusion. As a result, the principle runs through the whole GCM as a core tenet of 'safe, orderly and regular migration.' The overall focus on eradicating discrimination as central to any migration policy, whilst seemingly obvious, is a very positive step for the GCM. The language of the objective is largely positive and highlights the abhorrence of discrimination whether it be 'expressions, acts or manifestations of racism, racial discrimination, xenophobia or related intolerance against all migrants.' Encouraging States to ensure they have adequate legal frameworks in place to prevent, punish and remedy such acts is an important step. Taking forward the NY Declaration's commitment to eradicating xenophobia and racism is essential in promoting a positive dialogue around migration. The attention to the role of the media, especially through honest and fact-based reporting, is important in the current climate of populism and right-wing rhetoric, and acknowledges the huge influence the media has in promoting racist and discriminatory acts. The focus on a local, community-based approach to preventing discrimination is also important as it is at the grass-roots level that real change in perceptions can begin.

Despite the fact that the principle of non-discrimination and eliminating discrimination is clearly undisputed in the document, it remains inadequately addressed in Objective 17. Firstly, the objective appears to group together discrimination and racism and, while both are abhorrent and States must act to end their occurrence, they are different concepts and require different solutions. Discrimination is 'any distinction, exclusion or preference made on the basis

of race, colour, sex, religion, political opinion, national extraction or social origin' (Article 1(1) ILO 111); while racism or xenophobia are the belief that characteristics and abilities can be attributed to people simply on the basis of their race or difference from oneself (Kim and Sundstrom, 2014). Racism is the underlying belief that causes discrimination. Much of Article 17 seeks to overcome these underlying issues or hold accountable those who act upon them through violence, however, it fails to address the systematic and endemic discrimination against migrants in the State system and their policies.

This leads to the second challenge to implementation: the absence of an acknowledgment that through implementing this objective and abiding by international human rights standards States themselves must end discriminatory practises and policies, especially those that indirectly discriminate against migrants. A clear role for States in that regard remains lacking in the final draft of the GCM. The focus on 'shaping perceptions in public discourse' while positive, is only one part of eliminating discrimination. It is worrying that Objective 17 does not highlight the legal principle of non-discrimination, by which States are bound to treat migrants equally to citizens, as the starting point of eliminating discrimination.

In order to achieve this objective, States must commit to uphold principles of non-discrimination and implement international legislation where it exists. Of particular relevance to State practise is provisions within ICERD which requires States to 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races,'(Article 2)'. These international standards must be better upheld by States in order to overcome discrimination against migrants. States should use these well-established principles and obligations to guide their own policy.

Failing to acknowledge a State's obligation to abide by the international legal principle of non-discrimination and not implement discriminatory policies against migrants is a sad limitation of an otherwise promising objective. As a result, while Article 17 takes an important step towards eliminating discrimination towards migrants within society, this cannot be done without first a change in the practises of States in ensuring their compliance with international legal standards relating to the principle of non-discrimination. Only then can real change start in public policy and discourse.

## Objective 18: Invest in skills development and facilitate mutual recognition of skills, qualifications and competences

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### **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW, 1990) art. 52 (1 and 2a, b):**

1. *Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.*

2. *For any migrant worker a State of employment may:*

(a) *Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;*

(b) *Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.*

**The International Covenant on Economic, Social and Cultural Rights, Article 6 (1):** *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

**The International Covenant on Economic, Social and Cultural Rights, Article 6 (2):** *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

## Introduction

Objective 18 gives prominence to the concrete actions required to pave the way to cross-border mobility by focusing on “innovative solutions” that would facilitate the “mutual recognition of skills, qualifications and competences”.

The overall aim is to design a comprehensive framework of commitments that could link the fragmented practices of states and ensure genuine progress. Accordingly, three key dimensions have been outlined: First, the promotion of “normative” dynamics, such as the development of standards and guidelines for the mutual recognition of foreign qualifications and conclusion of mutual recognition agreements. Second, strengthening of the “infrastructural” environment, such as the use of technology and digitalisation to evaluate skills. Third, ensuring the “participation” of diverse actors, such as the private sector and trade unions to support a whole-of-society approach envisaged throughout the GCM.

Objective 18 goes hand-in-hand with numerous other objectives identified in the GCM, particularly Objective 5 on enhancing availability and flexibility of pathways for regular migration, and Objective 6 on facilitating fair and ethical recruitment and safeguarding conditions that ensure decent work. Importantly, the Objective encompasses; (i) migrant workers at all skills levels, and (ii) employability – understood as not merely the ‘ability’ to get a job, but as also to acquire and/or develop skills and competences for being and remaining employed, managing also to match the labour market needs – of migrants.

Mutuality, cooperation and human dimension in skills development and recognition of skills, qualifications and competences

This objective has undergone significant changes during the negotiations process that reflect a growing acknowledgement of its crucial role.

First, the requirement for reciprocal recognition of skills, qualifications and competences has been recognised by the addition of the word “mutual”; this addition occurred with Revision 2, and has maintained its place all the way to the Final Draft. Mutuality finds expression in the context of two relationships. The first is the state to state relationship, conducted, for instance, through concluding bilateral, regional or multilateral skills recognition agreements that are mutually beneficial. The second is the relationship between prospective or actual migrant workers and other actors, such as the private sector and educational institutions. For instance, Art. 34(a) of the Final Draft refers to developing standards and guidelines for the “mutual recognition of foreign qualifications and non-formally acquired skills in different sectors in collaboration with the respective industries with a view to ensuring worldwide compatibility based on existing models and best practices”. Standards and guidelines for certain sectors in certain countries and/or regions

already exist. For example, the Blueprint for Sectoral Cooperation on Skills is the EU framework to address short and medium-term sector-specific skills solutions. It currently has six pilot sectors, including space, textile and tourism. However, the GCM aims to reach beyond region specific partnerships, and aims “worldwide compatibility”.

Undeniably, the human dimension has been reinforced by the adoption of a new commitment (Art. 34 I; this commitment was originally introduced Draft Rev.2 as Art.33(i), then rephrased under Art.34(i) in the Final Draft) that aims to ensure that migrant workers are able to transition from one job or employer to another, which thus far has posed a great challenge, especially for migrant workers employed under temporary or seasonal workers’ schemes. For instance, the EU’s Seasonal Workers Directive (2014/36/EU) currently governs the conditions of entry and stay of non-EU seasonal workers. Art. 31 of the mentioned Directive allows for the change of employer by the seasonal worker, to “serve to reduce the risk of abuse that seasonal workers may face if tied to a single employer”.

Other changes include providing the opportunity to engage in entrepreneurship after the successful completion of programmes, promotion of the economic empowerment of women, and the commitment to ensure decent work in labour migration, which were added to Draft Rev.2 in Art. 33(g), Art. 33(h) and Art. 33 respectively. These additions remain in the Final Draft under Art. 34(g), Art. 34(h) and Art. 34, respectively. The acknowledgement of these principles in the objective can encourage them to trickle down from the global to the national level.

## The Future

Overall, the objective successfully identifies normative, infrastructural and interactional measures that must be developed, promoted or concluded to facilitate the mutual recognition of qualifications at all skills levels. It makes references to the rest of the GCM, especially to Objective 6, by calling for the recognition of decent work in labour migration. Under Art. 34(f) of the Final Draft, it also draws on the knowledge and best practices gathered under the Global Forum on Migration and Development (“GFMD”). In particular, the Business Mechanism promoted by the GFMD to engage governments, businesses and other stakeholders to facilitate coherent and comprehensive regulatory frameworks under four headings: skills mobility, responsible recruitment, pathways to labour markets and entrepreneurship and development (objective 18). These qualities bring the objective up to date with the recent challenges and developments in the recognition of skills, qualifications and competences.

However, we foresee some potential challenges in its effective implementation. It is crucial that the mutuality in the recognition of skills in state-to-state relationships is not limited to demand-driven work opportunities being offered. The progressive development of a mutual framework is needed to strengthen concrete opportunities for individuals and to foster the recognition of their foreign qualifications. Moreover, Revision 3 introduced the notion of employability of migrants in “formal” labour markets, which narrowed the scope of Objective 18 to formal labour markets only – this scope is also accepted under the Final Draft. While the Objective aims to cover formally and non-formally acquired skills at all levels and in different sectors, these skills must be employed in formal labour markets.

Finally, for the effective implementation of this Objective, additional efforts need to be developed to ensure that domestic rules, regulations and practices are consistent with its spirit or its wording. If adopted by the United Nations General Assembly, the GCM will be a non-binding document. Its implementation will be based on a voluntary basis. Minding this, the commitments under the GCM must not be taken lightly. Art. 34(a) of the GCM Final Draft refers to enabling “mutually beneficial skills development opportunities for migrants, communities and participating partners”. This mutualised understanding of labour mobility is based on a cooperation inclusive of migrants. There is a human-centred frame of reference to the “cooperative” nature of the commitments adopted. This is clearly in line with the overall principles of the GCM, and it confirms the need that member states contribute both to the creation of appropriate standards and mechanisms and to share the responsibility for their development.



## Objective 19: Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries

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**2030 Agenda for Sustainable Development, UN General Assembly A/RES/70/1, para 29:** *We recognize the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons. Such cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries. We underline the right of migrants to return to their country of citizenship, and recall that States must ensure that their returning nationals are duly received.*

### Introduction

Objective 19 concerns the creation of conditions for migrants and members of diasporas “to fully contribute to sustainable development in all countries”. In order to achieve this objective, the intention is “to empower migrants and diasporas to catalyse their development contributions, and to harness the benefits of migration as a source of sustainable development”. This objective endorses the full and effective implementation of the 2030 Agenda for Sustainable Development and the 2015 Addis Ababa Action Agenda by “fostering and facilitating the positive effects of migration for the realization of all Sustainable Development Goals” (action a). More specifically, Objective 19 points to the following priorities, emphasising the need:

- 1) to provide greater policy coherence and enhanced **institutional capacities for migrant and diaspora contributions**: this includes the integration of “migration into development planning and sectoral policies at local, national, regional and global levels” (action b) as well as institutional infrastructure, including dedicated diaspora offices or focal points, diaspora policy advisory boards and dedicated diaspora focal points in diplomatic or consular missions (action d);
- 2) **to research the non-financial contributions of migrants and diasporas as to create a sound evidence-base for policy-making**, i.e. to “invest in research on the impact of non-financial contributions of migrants and diasporas to sustainable development in countries of origin and destination, such as knowledge and skills transfer, social and civic engagement, and cultural exchange” (action c);
- 3) to expand government **outreach or liaison initiatives**, such as “targeted support programmes and financial products that facilitate migrant and diaspora investments and entrepreneurship, including by providing administrative and legal support in business creation, granting seed capital-matching, establish diaspora bonds and diaspora development funds, and organize dedicated trade fairs” (action e); the provision of “easily accessible information and guidance, including through digital platforms” (action f); and building of “partnerships between local authorities, local communities, the private sector, diasporas, hometown associations and migrant organizations to promote knowledge and skills transfer between their countries of origin and countries of destination” (action j);
- 4) **to enhance migrants’ political participation in, and engagement with, countries of origin**, “including in peace and reconciliation processes, in elections and political reforms, such as by establishing voting registries for citizens abroad, and by parliamentary representation, in accordance with national legislation” (action g);
- 5) **to promote migrants’ mobility** via the facilitation of “flexible modalities to travel, work and invest with minimal administrative burdens, including by reviewing and revising visa, residency and citizenship regulations” (action h), as means to maintain the link between diasporas and their country of origin.

This is a very ambitious list of action points. There are a number of countries which have made considerable advances in addressing or fulfilling a number of the actions listed above – such as in the case of Mexico, India, Sri Lanka and China – but to our knowledge, there is not a single country which has achieved the full gamut of actions listed in all areas and regards. A key impediment constitutes institutional capacity, hence the reach-out to migrants and diasporas tends to be patchy and policies not consistent across countries of destination and groups of migrants. Also, there is the

danger to focus on immigrants and the higher skilled to the detriment of temporary contract migrants who typically labour in the lower skilled, low wage sectors. We would, therefore, argue for an approach which transcends 'diasporas' in place of focusing on 'return migration', and thus, for policies to cater for all types of migrants in all migration corridors (South-North, South-South).

## On Categories

There are a number of definitional issues involved. First, a clear definition of what constitutes a "diaspora" and who the "migrants" are is lacking. The assumption seems to be that the former term relates to long-term, settled immigrants including second and third generations. The latter, by contrast, seems to refer to short-term migrants, such as temporary contract workers. An implicit elitism is involved in the approach to "diasporas" in relation to knowledge and skill transfer. Targeted are the highly skilled, professionals ("expats") who are also often the better protected, legally secure and long-term immigrants who manage to bring their families along and usually can embark upon a pathway to citizenship. Members of 'diasporas' are deemed 'transnational', whereby the term 'migrant' connotes a stronger sense of temporality. A certain section of the migrant population is a 'transient' category in the sense that they work abroad for a particular, limited period of time. Upon completion of their work contracts, they return to their country of origin. Once this happens they cease to be 'migrants' and become an integral part of the country of origin. This can also be seen in some sections of diaspora groups who return to their countries of origin 'for good' (sometimes not until retirement). However, the transition of diasporas can be less smooth as in the case of migrants, especially in the case of 'political' exiles (Orjuela 2008; Geoffray 2015; Brun and Van Hear 2012). At times, a complete switch over from 'diaspora' to 'local' is, therefore, not possible socially and politically.

Second, there is an underlying assumption that migrants and diasporas somehow represent their countries of origin. It has to be underlined, however, that diasporas are heterogeneous, consisting of diverse socio-cultural and even political factions, sometimes in alignment with the country of origin's social make-up, at other times not. This issue of heterogeneity is dependent upon class, religion, region of origin, reasons for and circumstances of emigration etc. This in turn has implications for the issue of institutionalisation and representation, i.e. when some members of a diaspora are regarded as the voice or representatives of an entire diaspora. This is very problematic particularly in relation to the following actions listed in the GCM: f) diasporas and humanitarian emergencies and g) diasporas in peace and reconciliation processes, but also as for elections and parliamentary representation, mentioned under action g). The political orientation of various diasporas (for example, of the Cuban diaspora) was not always in alignment or sometimes even blatantly counter the origin country interests, deriving from a particular class and property interest. In other cases, such as Iraq, diasporas have been influential in shaping a certain portrayal of the regime, thereby justifying Western interventionist policies. There are also examples of diasporas active in conflict, i.e. Northern Ireland, former Yugoslavia, Sri Lanka, providing political support for specific political ideas, humanitarian aid and occasionally weapons. Apart from the self-labelling as diaspora, there is the other labelling to be considered by members of host countries, where diaspora can be equated with difference at best, non-integration or non-assimilation at worst.

Third, another issue that is raised by the action points concerns the singular focus on migrants and immigrants, in isolation from members of their origin community. In regard to "integration", "participation" and "outreach", it is, however, important to include the voices of non-migrant members of the so-called home-town communities to make sure the priorities of local residents are not side-lined and the voices of diaspora members favoured over those who are directly affected e.g. by the channelling of funds from overseas residents. This has been well demonstrated by social science research (e.g. Mullings 2011). Last but not least, reference to gender is omitted from the action points in relation to this Objective which deserves addressing.

Our commentary proceeds by concentrating on facilitation of mobility. It will deploy an inclusive approach across various categories of migrants and in extension to non-migrant groups to ensure a non-classist approach which avoids leading to division not only among migrants/returnees but also in origin communities (as otherwise the case, see Ho 2011).

## Facilitation of Mobility

There are two important points raised in this section: one concerns the widening of possibilities of freedom of movement within regions and because of dual citizenship arrangements or visa portability; and the other a related issue of facilitation of portability of rights (including social security provisions, earned benefits and skills).

Starting with the country of origin perspective, provisioning of dual nationality or the kind of arrangement put in place by e.g. India (Non-resident Indian, as opposed to an Overseas Resident status for foreigners in India) is becoming more widespread. Together with the increase in visa-free travel between regions or sub-regions (e.g. EU, ASEAN, APEC, ECOWAS), such policies tend to benefit and target highly skilled professionals or business people. It does not ease mobility for the majority of the less-skilled migrants, however, who often end up in low-wage sector type of work but are also hailed 'agents for development'. Yet, their potential is severely constrained by highly restrictive migration policies. Cross-referencing could also be made here to the situation of international students who increasingly desire workplace experience after graduation before considering a possible return. This in turn relates to SDG 4.B and the call for more scholarships being made available.

Policies aimed at easing mobility in a transnational space concern countries of origin as much as countries of destination. The former need to implement citizenship provisions from an equitable perspective, in the form of inclusive citizenship for all, especially in countries where statelessness is a significant problem. In other words, facilitating access and rights of overseas residents while neglecting the same rights for non-citizen migrants is highly exclusionary and may result in social conflict over time.

Lastly, the GCM recommendation 6(h) calls upon governments to consider the issuing of portable visa arrangements which would ease mobility across borders, and thereby facilitate continuing relations between countries of destination and origin. Along with the portability of earned benefits, the enhancement of recognition of foreign qualifications/skills (Addis Ababa Action Agenda, page 50, paragraph 111) requires improvement also to facilitate and enhance mobility. From a gender perspective, the issue of work permits for foreign spouses is also of importance. Since the 'trailing spouse' is still often female, the skills of women are often side-lined or underused which has implications for gendered diaspora engagement in countries of origin.

## Inclusive Approach

The Action Points listed under Objective 19 rest primarily on the initiatives and responsibilities of governments and their agencies. This is understandable given the particular role of governments in fulfilling the SDGs. However, given the nature of the constituencies of migrants and diasporas, the initiatives and responsibilities should also be extended to civil society, both organised ones as well as small community-level ones. This would enable a meaningful engagement of migrants and diasporas at community levels in addition to large-scale national and sub-national level engagements.

In this context, it is therefore vital to acknowledge the 'politics of diaspora', and differentiate between collective political positions and social action (as in GCM actions g and f) on the one hand and the individual on the other hand. Furthermore, there is danger in excluding locals in country of origin communities from the decision-making process or consultations about "development" priorities (as per SDG Goal 16). Political inclusion of all (SDG Goal 10, target 10.2) is required, also in relation to potential gender differences in cases where diaspora organisations may be dominated by one gender. There is little research to date on gender in this regard, with more studies having focused on gender aspects of remittances (e.g. Kunz 2008). More knowledge should, therefore, be generated on the gender effects of diasporas.

Stigmatisation of some sections of migrant returnees (e.g. low-wage workers, presumed or actual sex workers) is a key impediment to socially integrate migrant returnees, especially women. Discrimination on the basis of class and/or gender which would constrain the migrant-returnees' ability to meaningfully reintegrate with their respective communities and societies should be counter-acted.

Finally, there is also a danger in asserting moral pressure on diaspora members in order to galvanise their efforts to proactively engage with their countries or communities of origin, with the effect of asserting moral "force" upon them, at times a pressure extended even across generations. Since they often have to already "prove" themselves worthy as newcomers in the country of destination, the additional expectation of their proactive involvement in the development of their country of origin can be overwhelming. Their engagement should, therefore, be purely voluntary. At the same time, non-migrants in countries of origin should also have the chance to be involved in 'development partnerships' alongside returnees or members of the diaspora.

## The Future

In urging the empowerment of migrants and diasporas "to catalyse their development contributions, and to harness the benefits of migration as a source of sustainable development", Objective 19 articulates an agenda that has been strongly promoted by a burgeoning epistemic community of development policy-makers (Gamlen 2014). Attempts to implement Objective 19 should approach existing policies based on migrant- and diaspora-led development critically because these are often based on flawed assumptions and idealised understandings of migrant and diaspora experiences (see also Pellerin and Mullings 2013). It is vital that policy-makers consider the migration dynamics in specific countries in order to ensure that the implementation of Objective 19 does not instrumentalise migrants and diasporas as tools of development, and places an equal responsibility on developed countries to ensure that the potential benefits of migration for development are realised.

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## Objective 20: Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants

*Dr Tugba Basaran (University of Cambridge) and Professor Nicola Piper (University of Sydney)*

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families  
**Article 47:** 1. *Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.*

### Introduction

Objective 20 commits in its title to work toward “faster, safer and cheaper remittances” and “financial inclusion of migrants and their families”. It endorses SDG target 10.c, that stipulates that by 2030 countries are to “reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent”.

The first five action points listed in the GCM take as their focus reducing remittance costs. To this purpose, the first one (a) endorses a roadmap for SDG goal 10c, and the following ones explore the steps to be taken: (b) support the platform of IFAD Global Forum of Remittances, Investment and Development; (c) harmonize remittance markets and avoid encumbrances hereof due to securitization measures; (d) conducive policy and regulatory frameworks; (e) innovative technological solutions. The remaining four action points are broader in their outreach, encouraging (f) increased transparency and financial literacy; (g) the establishing of a link between remittances and local development as well as entrepreneurship; (h) the consideration of the role of migrant women and (i) realization of migrants’ financial inclusion, in terms of their ability to open and hold bank accounts, make deposits and receive loans. Objective 20 and its action points have not been modified throughout the negotiation process.

Objective 20 largely amounts to an affirmation of the SDG Goal 10.c on remittances and does not add further points or qualifications hereto. The issue of remittances is approached from a sole monetary perspective. While the last four points touch upon the complex relationship of development and financial inclusion, insufficient detail is provided hereto and no clear guidelines for further action are given. In the SDGs, target 10.c. contributes to the wider SDG goal 10, that is to “reduce inequality within and among countries”. We suggest that it is important to keep this broader objective of addressing socio-economic inequalities in mind beyond the sole focus on monetary remittances only.

Our commentary proceeds as follows: (a) remittance costs; (b) financial inclusion; (c) cost of migration; (d) the future.

### Remittance costs

The Global Compact for Migration correctly highlights that the cost of remittance transfers is too high and, in sync with the SDGs, needs to meet the 3 percent target. The World Bank reports that in 2018 sending 200 USD cost on average of 7.1 percent, equivalent to 14.20 USD. Significant variations across migration corridors can drive up remittance costs to almost 20 percent in some of the highest cost corridors, such as Sub-Saharan Africa and the Pacific Islands. Given that many migrants (and most who move intra-regionally in a South-South context) are low-wage workers, the high costs of remittance transfer in and between many countries effectively rob individual migrants and their families of significant portions of their earnings. These are unnecessary losses which have serious implications for migrants’ ability to serve as the much acclaimed ‘agents of development’.

The cost of remittances, therefore, needs to be reduced. The above action points correctly emphasize on the one hand the need for deeper penetration of remittance markets through conducive policies, regulations, competition and technologies in an effort to lower unitary transaction costs, but on the other hand also acknowledge the adverse effects of securitization measures on remittance markets. The remittance sector is still perceived as high risk and low return by the principal financial institutions. Anti-money laundering (AML) and combatting the financing of terrorism (CFT) measures (FATF Recommendations 2018) have led to de-risking strategies (i.e. restriction of business relations with high-risk clients) of major global banks. This had an important impact upon remittance service providers, particularly cash-based money transfer providers, such as Western Union and MoneyGram, that presently cover the vast majority of remittances in the global market (FSB 2018). Considering money transfer operators as high-risk clients, has led to a widespread closure of their correspondent banking accounts without individual differentiations (Amicelli 2018). Through action points (b) to (e), the Global Compact for Migration correctly highlights a number of bottlenecks that continue to keep remittance costs at twice the SDG target level.



## Financial inclusion

Questions of remittances cannot be delinked from broader questions of financial inclusion. It is important to take into account why many migrants and their families resort to expensive remittance transfers and rely on cash-based money transfer providers (such as Western Union) or informal channels in the first instance. The widespread exclusion of migrants and their families from regulated financial service providers and services, both in home and host countries, is well established. Many do not have access to a range of financial services (i.e. accounts, loans and deposit mentioned in GCM point i), but also lack access to insurance products. Major bottlenecks for using the services of banks, for example, include the lack of legal identification documents, high administrative burdens associated with opening an account, lack of proof of residency requirements, and the cost of a banking account, just to mention a few. Further, financial infrastructure is uneven, largely dependent upon location and the availability of technologies. The lack of financial infrastructure is particularly evident in rural areas, where almost half of the money that migrant workers earn is sent to.

These forms of financial exclusion generally marginalize poorer and rural segments of society. They particularly penalize those migrants who reside or work on an irregular basis (without proper documents), in isolation (i.e. in the private sphere of employers such as domestic workers, on construction sites or in rural areas on plantations), or are not settled but have seasonal or project-related movement patterns (i.e. agricultural workers or construction workers). These lead to cost of remittances dependent on the legal status, type of work and working place of the remitting person. Given widespread gendered differences in relation to level of pay, working conditions and remitting behaviour (and expectations), women's specific situation has to be considered too. The GCM only underlines the importance to consider "gender-responsive distribution channels to underserved populations, including for persons in rural areas, persons with low levels of literacy, and persons with disabilities", but it needs to go further than this and demand the full financial inclusion of (male and female) migrants and their families, both in their home and host countries.

## Cost of Migration

It is important to look beyond the cost of remittance transfers to guarantee fair remittances and to ensure that migrants can provide their families with sufficient money on a regular basis. This requires an engagement with the costs borne by migrants throughout the migration cycle. In *Global Labour and the Migrant Premium: The Cost of Working Abroad*, Basaran and Guild have provided a systematic overview of the premium costs that migrants shoulder in order to live and work abroad. Migrants relinquish a significant share of their foreign earnings during the migration cycle. Recruitment costs alone can amount to ten months of foreign earnings and many are likely to lose one to two years of foreign earnings, if all migrant worker borne costs are considered. These include up-front costs for recruitment, but also differentials in wage, working and social conditions, as well as return costs.

This raises the important issue of fair wages, that is to pay a decent wage so that migrants have more to remit. Practices of holding back wages or sudden deducting of amounts for services allegedly provided are still common. It is also important to address the availability and portability of social rights – pension, social security payments. As per current practices, there is a significant premium paid by migrant workers on their net foreign earnings, compared to their national counterparts in the destination countries. Reducing the cost of international labour migration, i.e. the premium that global workers pay to live and work abroad is particularly pertinent today, and supported through international laws and standards (idem: p. 6). The GCM engages with some of these in Objective 6 on recruitment and decent work, Objective 15 on basic services and Objective 22 on portability of social security entitlements and earned benefits. It is important that the discussion about remittances goes beyond remittance transfer costs and financial inclusion. Remittance transfers need to be considered within the broader context of the cost of migration and increasing available remittances to migrants and their family members.

## The Future

The significant role of remittances for low and middle-income countries can hardly be denied. At US\$466 billion, recorded remittance flows to low and middle-income countries are more than three times the official development assistance and, excluding China, larger than foreign direct investments. For many countries, remittances represent the largest source of foreign exchange earnings. Countries receiving the highest remittances are India (US\$69 billion), China (US\$64 billion); the Philippines (US\$33 billion) and Mexico (US\$31 billion). In terms of the significance of remittances, a number of small low-income countries are highly dependent: the remittance amount as percentage of GDP are the highest in the Kyrgyz Republic (35%), Tonga (33%), Tajikistan (31%), Haiti (29%), Nepal (29%) and Liberia (27%). Moreover, these figures are based on officially recorded data and are likely to be much higher when informal channels are included. While remittances are undoubtedly important and constitute a vital source of private capital, the GCM underlines that they cannot be equated to public sources of financing for development. Nonetheless, over the last decades, the focus on migrant remittances has tended to result in migration being treated as a 'tool for development' pushing migrants into the role of local development agents.

Another issue concerns the use of remittances which depends upon the specific situation each family finds itself in: its life course, composition, social and human capital networks. While poor households use remittances for immediate needs, including food, housing and education, vulnerable household may need them as an 'insurance' against future risks, including sickness or funeral costs, or invest them in insurance-equivalent saving mechanisms, including cash, jewellery or livestock. The amount left for long-term investments may well be overestimated by development actors.



Migrants' investment in their host countries also require at least a mention (see Objective 19). Furthermore, in light of recent discussions, it remains important to note that family remittances should be understood as person-to-person transfers: sender and receivers of personal remittances should not be disadvantaged as 'representatives' of a country. Particularly recent propositions to tax remittances, to collect taxes for a border wall, but also to enhance economic sanctions towards particular countries or to show other forms of disagreement with the government and/or policies of a remittance-receiving state may lead to an entanglement of individual remittances with political actions. Personal remittances should be exempted from inter-state political factors and politics of security.

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## Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration

Dr Izabella Majcher (*Global Detention Project*)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3(1): *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

### Introduction

Objective 21 of the Final Draft of the Global Compact for Safe, Orderly and Regular Migration (GCM) addresses the process of expulsion, which, in the GCM, comprises three measures, notably return, readmission, and reintegration. Regarding return, states commit to facilitate safe and dignified return and to guarantee due process, individual assessment, and effective remedy by upholding the prohibition of collective expulsion and of return to a risk of serious human rights violations. Under the readmission component, states commit to duly receive and readmit their nationals. Finally, the measures aimed at sustainable reintegration include personal safety, economic empowerment, inclusion, and social cohesion. In order to realise this triple commitment, Objective 21 proposes nine sets of actions, detailed in para.37(a)-(i). Overall, Objective 21 places significantly more emphasis on the tasks relating to readmission and reintegration, which fall upon countries of origin, than on the obligations linked to return, which bind sending states. The implementing actions contain several laudable provisions, including emphasis on gender-responsive and child-sensitive features of return, the mention of the rights of the child, the principle of the child's best interests, and the right to family life and family unity (in the context of return of children) and procedural guarantees. Yet, the actions fail to include a number of norms which are fundamental in the process of expulsion, such as the principle of *non-refoulement*, prohibition of collective expulsion, and the right to life and prohibition of ill-treatment during forcible return.

### The Evolution

Throughout the negotiation process, several changes were made in successive drafts of both the commitments and the implementing actions of Objective 21. The obligations of expelling states have been widened in some areas while reduced in other ones, the readmission component has been expanded, while duties aimed at sustainable reintegration have been slightly broadened. This commentary discusses the most significant changes.

#### *The principle of non-refoulement*

In Objective 21, states commit not to return migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm. This commitment is crucial in the context of return as it reflects the absolute prohibition of *refoulement*, enshrined both in customary and treaty law (art.6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and art.3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). However, to emphasise the binding nature of this norm, it would have been desirable to explicitly name it as the principle of *non-refoulement*, as was done in Revision 2. The actions needed to realise this commitment are set out in para.(e). This paragraph refers to a number of procedural safeguards (such as individual assessment, legal remedies, and due process guarantees), yet is silent as regards the substantive protection from *refoulement*. Given the essential role of the principle of *non-refoulement*, it would have been welcome to include the *non-refoulement* obligation among the implementing actions under para.(e).

Unlike all previous drafts, the final version of para.(e) provides that return is to be carried out through "prompt and effective cooperation between countries of origin and destination." This paragraph should be read alongside para. (c), under which countries (of origin) should cooperate on identification of their nationals and issuance of travel documents for their return. The involvement of countries of origin in return proceedings may undermine the very protection from *refoulement*. It should never be sought promptly, as required in para.(e), or simultaneously or even before the person has exhausted legal remedies against his expulsion, as the language of this paragraph suggests. Consular or other authorities of countries of origin must never have access to people or information about the identity of people who may need international protection. The host state may request the country of origin to confirm the nationality of the potential returnee and to issue the necessary travel documents only after any risk upon return has been thoroughly assessed and excluded and the person had access to an effective appeal to challenge his expulsion (see here a recent case where authorities of the country of origin were involved in identification of their nationals who had valid protection claims).

## *Return of children*

The final version of para.(g), which addresses return of children, sets forth general principles in a stronger language than the previous drafts. Accordingly, states should ensure that return of children is carried out only after a determination of the best interests of the child (also provided in art.3 of the Convention on the Rights of the Child (CRC)) and takes into account the right to family life and family unity. Yet, the final draft fails to require that states return a child to his family. Instead, all it demands is that there are appropriate reception, care, and reintegration arrangements for children upon return. According to the Committee on the Rights of the Child (para.80–81), family tracing is essential in searching for a durable solution and should have priority except where it is not in the child's best interests. To comply with the obligation under art.9 of the CRC to ensure that a child is not separated from his parents against his will, states should make all efforts to return an unaccompanied child to his parents except where further separation is necessary for the child's best interests.

Two main questions which induced most of the revisions concerned the body accompanying the child through the return process and the place of return. Regarding the first issue, while the original draft foresaw that the child had to be accompanied by a guardian, pursuant to the final version of para.(g), the child is to be accompanied either by a parent, legal guardian, or "specialised officer." In practice, a "specialised officer" may be a police or migration agency officer, lacking a child-protection mandate. Despite the weakened terms of para.(g), the principle of the child's best interests and the right of children deprived of their family environment to special protection and assistance (art.20(1) of the CRC) entail that before returning a child, the host state appoints a guardian. The guardian should have the necessary expertise in childcare and represent the child's rights. Hence, according to the Committee on the Rights of the Child and the Committee on Migrant Workers (para.32), agencies whose interests could potentially be in conflict with those of the child, including migration authorities, should not be eligible for guardianship. In terms of the place to where states may expel the child, the initial and three subsequent drafts spoke of "countries to which [the children] are being returned" or "the country of return," suggesting that the destination country is not necessarily the child's country of origin. In contrast, the final wording of para.(g) refers to countries of origin, which complies with the child's best interests.

## *Voluntary vs. forced return*

The requirements regarding the form of return have been gradually diluted during the process of negotiations. Up to Revision 2, Objective 21 prioritised voluntary return over forced. As a result of successive modifications, the final draft is silent in this regard. Under para.(b), states should promote voluntary programmes, yet they are not bound to opt for voluntary return before forcibly returning the person. That notwithstanding, pursuant to international standards (para.87), return should be primarily voluntary. The priority to voluntary return can be implied from the principle of proportionality, which requires that limitations of the individual's freedom of action are the least restrictive possible. More generally, voluntary return is better suited to be "safe and dignified," which is what Objective 21 seeks to promote.

## *Cooperation on readmission*

The readmission duties of countries of origin have a prominent place in Objective 21 and have been widened in the course of the negotiations. In the first four versions of Objective 21, countries committed to duly receive their "returning nationals," what suggests voluntary form of returns in that regard. The final draft of this commitment is couched in slightly different terms, namely, countries commit to duly receive and readmit their nationals. Under the current formulation, this commitment appears to extend to people being forcibly expelled. Also, a second part has been added to this sentence. Accordingly, countries commit to receive and readmit their nationals, in full respect for the human right to return to one's own country and the obligation of states to readmit their own nationals. Indeed, under art.12(4) of the ICCPR, no one may be arbitrarily deprived of the right to enter his own country. Sending countries frequently rely on this provision to induce countries of origin to readmit their nationals. Yet, since it enshrines the right to return to one's country, the concomitant obligation to accept the return of nationals applies only to voluntary return. Precisely because there appears to be no obligation under international law to readmit its nationals who are forcibly returned, sending countries use various incentives to persuade countries of origin to sign readmission agreements and swiftly readmit their nationals. These agreements are addressed in para.(a).

The scope of readmission cooperation has been widened during the negotiations, to include more flexible arrangements. Pursuant to the final version of para.(a), countries should develop and implement bilateral, regional, and multilateral cooperation frameworks and agreements, including readmission agreements, for return and readmission. The onus of implementation, added in the course of negotiations, is obviously upon countries of origin. Agreements with a readmission clause commonly intertwine countries' of origin readmission and border control duties with financial and in-kind assistance in border management offered by host countries. They give more leverage to sending countries to convince countries of origin to cooperate on readmission. Cooperation frameworks on readmission, currently in focus of the European Union, commonly refer to flexible arrangements, which may easily escape parliamentary scrutiny. Bilateral forms of agreements, added during the negotiations, also offer more flexibility to states. In particular, non-standard bilateral arrangements, such as memoranda of understanding or police cooperation arrangements, are typically opaque, with human rights obligations being more easily side-lined. Overwhelmingly flexible readmission arrangements foreseen in para.(a) may impede democratic and judicial oversight, dilute responsibility of the involved countries, and ultimately increase the risk of human rights violations. While seeking cooperation of countries of origin,

host countries remain bound by their international human rights obligations not to send anyone to a risk of serious violations of the person's fundamental rights.

## The Future

Alongside Objective 13 addressing immigration detention, Objective 21 deals with one of the most sensitive elements of migration management. Expulsion of non-citizens in irregular situation is associated with traditional sovereign prerogatives. Yet, these prerogatives should be exercised in accordance with states' international human rights obligations. The formulation of Objective 21 overall appears inadequate since it aims at merely safe and dignified return rather than return which is also human rights-based. Yet, Objective 21, like all the remaining objectives, is fully rooted in international human rights law, as repeated in the GCM (para.11, 15, and 41) and the New York Declaration for Refugees and Migrants (para.5, 11, 22, and 41), and states should implement it in compliance with their international obligations. Protective provisions enshrined in Objective 21 are not an expression of states' good will or moral duties towards migrants but reflect a set of human rights norms and standards governing expulsion measures.

The triple commitment in Objective 21 (return, readmission, and reintegration) and actions needed to realise it reaffirm a number of relevant norms, such as the prohibition on return to a risk of serious violations of the person's fundamental rights, the prohibition of collective expulsion, the principle of the child's best interests, and due process guarantees. On the other hand, Objective 21 is silent about the right to family and private life, set forth in art.17 of the ICCPR, which may operate as a human rights obstacle to return. On a few occasions, Objective 21 lays down lower protection standards than required by the UN human rights monitoring bodies, including the lack of requirement that unaccompanied children are to be always represented by a qualified guardian or that voluntary returns should be prioritised over forcible ones. Other potential challenges that may arise when Objective 21 is implemented relate to cooperation between sending and destination countries. It provides for prompt involvement of countries of origin in identification procedures and, more broadly, foresees a wide range of cooperation schemes, overwhelmingly characterised by flexibility and potential lack of oversight and accountability. The protection gaps in Objective 21 and challenges resulting from its implementation should not divert states from their international human rights obligations relating to expulsion.

Finally, any return policy should be accompanied by adequate regularisation measures. Not all people who were refused refugee or other protection status can leave the host state. Usually, countries tolerate non-deportable people's stay, without offering them any permit. Left in a semi-legal limbo situation without access to adequate socio-economic rights, non-deportable migrants risk becoming destitute. Besides breaching their obligations under the International Covenant on Economic, Social and Cultural Rights to ensure basic means of subsistence to anyone under their jurisdiction, by failing to regularise non-deportable people, states fall short of achieving orderly and regular migration. Objective 21 speaks of the "return of migrants who do not have the legal right to stay" (para.(e)), implying that the lack of legal status should trigger return. According to the UN High Commissioner for Human Rights, the GCM should commit states to develop appropriate mechanisms to grant legal status to migrants who cannot return. Regularisation measures are addressed in Objective 5 dealing with pathways for regular migration, to which Objective 21 omits to refer. In Objective 5, states commit to adapt options for regular migration in a manner reflecting the needs of migrants in vulnerable situations. Among the implementing actions, Objective 5 foresees humanitarian visas and temporary work permits for people whose return to their countries of origin is not possible, based on compassionate, humanitarian, and other considerations (para.21(g)). States expressed this commitment already in the New York Declaration, as they welcomed granting temporary protection against return to migrants who do not qualify for refugee status but are unable to return to their home countries (para.53) and enumerated regularisation policies among the elements that the GCM should include (Annex II, para.8(p)). Return addressed in Objective 21 should be complemented by regularisation schemes under Objective 5.

## Objective 22: Establish mechanisms for the portability of social security entitlements and earned benefits

*Professor Elspeth Guild (QMUL)*

**Article 22, Universal Declaration of Human Rights:** “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

### Introduction

The aim of Objective 22 is to resolve transnational social security problems for migrant workers and their families. The problem which it seeks to address is the inconsistencies and incompatibilities in national social security systems which result in migrant workers contributing to social security funds designed for their welfare but being unable to access benefits when, but for their status as migrants (or former migrants), they would be entitled. This is a frequent problem of migrant workers. In their host state, they contribute in their capacity as workers, to various social security systems, for health care, unemployment benefits, maternity care, pensions etc. As long as they remain resident in their host state (and in a regular status) they can usually access those benefits in their capacity as workers and former workers. But when they return to their home state or third state (should they do so) the lack of agreement between their states of residence and employment may mean that the benefits of their contributions are lost. It is a common principle of national social security systems that most benefits can only exceptionally be exported if a worker leaves the country. This can mean that a migrant worker who returns to his or her home state loses all accrued benefits. This may result in migrant workers being ‘trapped’ in their host state as the cost of leaving is the loss of all social benefits attached to that specific social security system. If they return to their home state to retire or to start a family, they may be destitute as a result if their only income was that resulting from their social security contributions in another state which contributions do not give rise to entitlements which are portable. Another consequence of the lack of coordination in social security across countries is that social contributions by migrant workers end up subsidising the social security funds for residents on the host state’s territory because the migrants are unable to access any benefits on account of their whereabouts (or in some cases status as migrants). Some commentators have likened this to theft.

### Comparison

This provision has changed little from the 5 February 2018 Zero draft. The subject has remained stable and the changes have been mainly cosmetic. As the format of the objectives became harmonised, so this objective took up the common language in particular the exhortation to states to draw from the actions set out to resolve the issue.

The objective commences with a commitment to assist migrant workers irrespective of their skills levels to have access to social protection in their host countries. Social protection is a wider term than social security as the latter is normally defined as including contributory benefits only while social protection is usually used to cover the whole gamut of benefits including those which are paid out of general public funds (e.g. taxation). It is always easier to reach agreement on social security benefits for migrant workers than other social benefits to which migrant workers may only have contributed through the payment of taxes rather than specific insurance related contributions. Thus assisting migrants to have access to social protection in the host country is easier than seeking to regulate the export of all social protection to the home state in the event that the migrant worker returns there. To cover this difficulty, the objective proposes that migrant workers should profit from portability of applicable social security entitlements and earned benefits in their home countries when they return there. There is no reference to social protection portability. The objective also covers onward migration to a third country.

The objective proposes a number of actions (four in the Zero Draft, diminished to three in the Final Draft through the consolidation of subject matters not the exclusion of areas) to deliver on the commitment. First, non-discriminatory national social protection systems including social protection floors for national and migrants is recommended. This is consistent with ILO Recommendation 202 agreed in 2012 which brought international coherence to the principle of social protection floors and international agreement on the importance of the concept. The idea here is that there is one floor of social protection rights applicable to all workers and their families. In Recommendation 202 this floor is defined as “basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion”. The Recommendation sets out 18 principles to achieve this outcome. While these are not repeated in the objective, the reference to the Recommendation gives authority to the use of those principles in pursuit of the GCM objective.

One of the keys to achieving successful outcomes in coordination of social security for migrant workers is the conclusion of international agreements. The objective makes this a second action for states to take. In particular, it states that international agreements should be concluded to ensure portability of earned benefits. This differentiates between social protection benefits and earned benefits – those to which the worker has contributed. Specifically included are

pensions and healthcare but there is also a catch-all 'other earned benefit' for other types of contributory benefit. The action also suggests that agreements should cover both long-term and temporary migration. The third action calls on states to integrate rules of portability of entitlements and earned benefits into national social security frameworks. One of the big obstacles for migrant workers to access social security entitlements from a host state once they have left is getting anyone in the administration to respond to their requests. Migrant workers form only a small percentage of the labour force in large states. Those states where they constitute a substantial part of the labour market tend to be small and very limited in number. Consequently, when former migrant workers make demands for their social security benefits to be exported often there is no specified person in the social security bureaucracy designated to deal with their applications. As these are inevitably more complicated than claims by nationals (frequently compounded by language problems) they often do not attract the necessary attention to resolve the application. The action proposes that national focal points be designated in countries of origin, transit and destination which are responsible for facilitating portability requests from migrant workers. Specific attention should be paid to women and older persons, according to the action, as they often face additional difficulties. The action proposes migrant welfare funds to be created in countries of origin to support migrant workers and their families. This suggestion may be ambiguous as the assumption is that such funds are supported financially by host countries where the migrant workers have once worked. In some examples of this kind of fund, migrant workers' social contributions instead of funding benefits for the workers in their home states are used to fund organisations which 'support' returned migrant workers generally, funding salaries etc. of those working in the organisation. This may benefit returned workers in general but destroys the insurance nature of social security contributions which fund individual's pensions and other social benefits.

## The Future

This objective will be well served if it takes seriously the recommendation to apply ILO Recommendation 202 and promotes ratification of ILO convention 102 on social security. One of the advantages of the Recommendation and the Convention is that they are of general application, improving the economic situation of everyone, not only migrant workers. The development of comprehensive social protection nets helps migrant workers, particularly those who are on low wages but also transforms the host community into a more equal one. Social security coordination through international agreements is notoriously complex and tends to be lengthy. The benefits can be very substantial for migrant workers so complexity should never be an excuse of failure to act but action does require an investment of administrative resources to achieve a result. Often multilateral agreements can be useful to reduce costs, but the specificities of different systems can make this hard to achieve (as the EU is well aware). Key to achieving the objective of portability is the commitment to reduce administrative obstacles which migrant workers encounter when they try to claim their benefits, particularly when they have returned to their home country. Action to create focal points in countries of origin, transit and destination is an excellent place to start to ease the achievement of the objective: portability of social security entitlements. Countries where contributions have been made by migrant workers must reverse legislation which diminishes the portability of those benefits or lowers the value of them purportedly to adjust to the conditions of the home state of the worker.



## Objective 23: Strengthen international cooperation and global partnerships for safe, orderly and regular migration

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### Introduction

Objective 23 of the Global Compact for Migration is titled 'Strengthen international cooperation and global partnerships for safe, orderly and regular migration'. Its key content and direction is expressed in the introductory paragraph of the final version where the objective '[underscores] the specific challenges faced in particular by African countries, least developed countries, landlocked developing countries, small island developing States, and middle-income countries'. Given that, arguably, all of the Global Compact for Migration relates to international cooperation and partnerships, it is an interesting Objective, not least as it was added rather late in the process of negotiations in which governments of the United Nations General Assembly (UNGA) engaged. The document, which is based on the New York Declaration of September 2016, had already undergone three rounds of negotiations and changes to its language by the time the African Group was successful in convincing other parties to agreeing to include it. With other sections, namely paragraph 15 and paragraphs under the heading of 'Implementation' outlining how the Global Compact was to be implemented and by whom, the Objective's title is a little misleading. One might think that this objective is written in the spirit of say, the ICESCR Article 2(1), in which international cooperation and assistance are invoked with the apparent aim of achieving maximum realisation of specific norms (in this case, safe and orderly migration).

The Objective does not quite do that. Essentially, this Objective frames the interaction between the rich Global North and the Global South as recipient countries of 'financial and technical assistance', as it is phrased in Objective 23. One might be forgiven to think that such a differentiation undermines the emphasis adopted through the 2030 Agenda on Sustainable Development. The Agenda constructs sustainable development as a universal good which aims at development in all countries, as such it underscores the importance of not making crude differences between Global North and Global South, but approaching poverty alleviation and the fight against inequality everywhere. Based on this conundrum we wonder if this Objective genuinely acknowledges hierarchical power-relations between countries whilst acknowledging that migrants bring benefits to all countries they interact with; or if it is a re-hashing of old myths whereby governments hope that investing in development initiatives is used as a deterrence mechanism to restrict the mobility of people and used as a justification for gaining funding for national governments in the Global South? More directly, what, in addition to other Objectives, does this Objective say about international cooperation and global partnerships?

In the following we will show that this Objective is quite ambivalent in what it communicates about cooperation and partnership.

### Approaches, mechanisms and relationships

Objective 23, paragraph 39 a) of the final version of the Global Compact states that 'provision of financial and technical assistance, in line with national priorities [is to be achieved] through a whole-of-government and whole-of-society approach'. The latter reference to the approaches was the only substantial change of language between the introduction of the Objective in Draft REV 2 and the final draft. These approaches are set out in paragraph 15 of the Global Compact under the heading 'Our Vision and Guiding Principles'. Clearly, in the context of a 'whole-of-government' approach as a guiding principle the negotiating parties have taken their cue from civil society, as well as more specifically academic input. Research has pointed out for a long time that diverse units of governments, including local authorities and municipalities, need to work more in concert (Balbo and Marconi, 2005; Landau and Segatti, April 2009) in order to both live up to a government's legal obligations of protection and to enhance the potential arising out of international human mobility. That this approach is being taken seriously was expressed at the end of 2017 when 130 cities globally signed a letter sent to the co-facilitators of the negotiation process asking to be better included in the process (Allen-Ebrahimian, 5 December 2017). Thus, when paragraph 15 calls on governments to ensure 'coherence across sectors and levels of governance', it seems that the Global Compact is genuine in aiming to operationalise the general intention expressed in the New York Declaration that international human mobility is to be reframed more constructively so as to acknowledge the positive impact arising out of international mobility at all levels, including the local level of governance. However, the only Objective other than 23 that makes reference to a 'whole-of-government approach' is Objective 11, which clearly locates this principle at the national level and in the context of border control. Such a reading then calls into question what, exactly, might be meant when a whole-of-government approach is referred to in the context of discussing the relationship between the Global North and the Global South. What we have in mind here is that in recent decades some of the development-oriented financial assistance provided by the Global North was linked to human mobility and given for the expressed purpose of containment as the research by Shacknove (1993) or Hyndman (2000) (amongst a variety of studies) shows.

Further, the wording in Objective 23 paragraph 39 a) also seems to indicate that more than lip service is to be paid to participatory approaches here called 'whole-of-society approach', especially taking account of paragraph 39 c) which

explicitly states that local authorities amongst other stakeholders are to be 'involved and supported'. Both paragraphs 15 and 44 of the final draft of the Global Compact clarify who is to be included when governing international human mobility inclusively by all of society. This ranges from faith-based and other civil society organisations to now also include migrants themselves, the private sector, the media and parliamentarians and others. This is a new development, not because many of these stakeholders had not been involved in practices around migration governance – they have; but rather the novel development appears to be that responsibility for implementing the Global Compact is shifting to those who encounter the phenomenon of international human mobility in all its complexity locally, rather than relying on an often heavy-handed and essentialising approach by national governments who emphasise their sovereign prerogative over controlling access to territory (see Preamble, paragraph 15, Objective 11). It thus seems that local government and locally based groups of society are at the heart of new ways to cooperate and partner in the area of migration governance.

In addition to cooperation as described above, Objective 23 paragraph 39 d) states that governments of the UNGA commit to 'make use of the capacity-building mechanism' and to build on 'other existing instruments'. The understanding of what capacity-building means in the Global Compact conflicts with how capacity-building is usually understood when it comes to governing international migration; namely, that enforcement units of governments of the Global North train enforcement units of countries in the Global South (see for example: Andersson, 2014) which is possibly more closely reflected in Objective 9 on Smuggling and Objective 11 on Managing borders. Yet, what is interesting in Objective 23 paragraph 39 d) and the relevant paragraph under the heading of 'Implementation' is that here, a regional approach to all development-related activities of the UN system, including the GCM, implemented by the international system is envisaged.

UN-type capacity building has developed out of two processes that run parallel to the negotiations of the Global Compact. First there is a process that accumulated in the UNGA resolution 72/279 adopted on 31 May 2018. The resolution sets out a repositioning of the UN development system roughly based on a (re)generation of country teams supported by a resident coordinator system within a regional approach. The restructuring to achieve this repositioning is to take place through the course of 2018/19. A second process was a consultation, which took place within the remit of the Special Representative of the Secretary-General for International Migration, amongst the UN and its agencies as well as others to collate, report on and make recommendations as to how best the UN system was to respond to expectations set by the Global Compact.

In May 2018 there was thus a push by the Special Representative and by the co-facilitators to focus on international cooperation and capacity-building, which was also supported a little later in a commentary by the Deputy Secretary-General who linked the two processes to include in paragraph 43 a description of what capacity-building was to entail: a connection hub that facilitates demand-driven solutions, a start-up fund and a global knowledge platform. This capacity-building mechanism seems to support the whole-of-society approach by enabling 'the mobilizing [of] technical, financial and human resources' which can be claimed by all those actors identified as responsible for implementing the Global Compact (see Objective 23 paragraph 39 d) and paragraphs 43 and 44).

What we see, in summary, is an interesting shifting of governance up to regionalised UN mechanisms on the one hand and a shifting down to local-level governance. If this were genuinely meant to support the eradication of poverty and inequality, this would indeed be progressive. Yet, reading Objective 23 paragraph 39 b) more carefully we learn that 'cooperation [is] to accelerate the implementation of the 2030 Agenda for Sustainable Development in geographic areas from where irregular migration systematically originates ...'. This is one of the three reasons the African Group had used to advocate for 'their' objective. The other two reasons that financial assistance was needed were that 'tensions' in the context of repatriation needed to be regulated and that humanitarian assistance was required. These, however, have not appeared in any of the negotiated draft versions, probably for obvious juridical and political reasons.

## The Future

So, what do we learn about international cooperation and partnerships from this Objective? As indicated above, Objective 23 in conjunction with paragraphs 15, 43 and 44 raise interesting intellectual and practical problems about changes in the governance of international migration and more broadly the configuration of global order where there is emphasis on the supra-national/international on the one hand and the local on the other. What possibly new role does this assign to the nation-state? How do we implement international governance at the local, municipal level? Geographers and other academics have been thinking about this for a while now, but how will academic lawyers, international lawyers, political scientists and international relations scholars approach this interesting problem and very practical problem? And how do these groups interact with the professional groups active in the field?

More concretely, reading the original proposal of the African Group for Objective 23, it could also be interpreted that, however crude the differentiation into Global North and South is, some governments wanted to remind some other governments that very real burden-sharing via financial assistance should not be forgotten. This is despite declarations that all of the world still needs to fight poverty and inequality. Yet, the very clear reference to 'irregular migration' and the fact that the two 'whole-of-' approaches appear in two objectives which clearly are of greater interest to governments of the Global North, we might be justified in thinking that Objective 23 reads more like a partnership of deterrence and collusion in cooperation.

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# Implementation, Follow-Up and Review

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## Introduction

The sections on Implementation, Follow-Up and Review address the operational aspects of the Global Compact for Migration and are crucial for putting the norms and substance of the 23 Objectives into practice. As pointed out by the UN Deputy Secretary-General Amina Mohammed on the occasion of the fifth round of negotiations on 7 June 2018, "implementation will be the ultimate proof of the Compact's success. Much will depend on the ability of Member States to leverage the common ground captured in the Global Compact towards more effective and scaled-up cooperation. A strong, fluid, multilayered follow-up framework, supported by a solid evidence-based and open, inclusive mechanisms, will also be essential." (UN Press Release DSG/SM/1183-DEV/3338). This is especially so given the Compact's non-legally binding nature and its reliance on "objectives" to be achieved over time. Given this process-orientation, the final draft comprises five types of operational measures: a capacity-building mechanism including funding and knowledge sharing; the UN network on Migration; global, regional and sub-regional dialogues; an intergovernmental review forum at the global level, to be supported by regional and sub-regional fora; and national action plans.

## Comparison

The basic pillars of the two sections on "implementation" and "follow-up and review" were already contained in the Zero Draft. Main changes concern: greater emphasis on the role of states; clarification of the role of **UN institutions** in particular through the details of the capacity building mechanisms and intergovernmental review forum, including an upgrading of the IOM; and, more cross-references to associated processes such as the Global Forum for Migration and Development or the Sustainable Development Goals. In contrast to the Zero Draft, which provided for a prominent role of regional mechanisms in implementing and reviewing progress under the GCM, the references to regional level institutions have become more flexible and open with subsequent drafts. Overall, the involvement of local/city, subnational and regional levels of governance as well as of stakeholders has been maintained and clarified.

Whereas Art. 38 of the Zero Draft already acknowledged "taking into account our countries' specific migration realities and priorities", the final draft now reads "taking into account different national realities, capacities, and levels of development, and respecting national policies and priorities". Similarly, the first Article in the Section on "follow-up and review" was reformulated from "We commit to track and monitor the progress made in implementing the Global Compact in the framework of the United Nations", including intergovernmental measures (Art. 43 Zero Draft), to "We will review the progress made at local, national, regional and global levels in implementing the Global Compact in the framework of the United Nations through a State-led approach and with the participation of all relevant **stakeholders**", including intergovernmental measures (Art. 48 Final Draft, emphasis added). The central role of **states** – and the respect for their sovereignty including the principle of voluntarism also transpire from a new article introduced with the June Draft (Rev 3) and reformulated in the Final Draft according to which "We encourage all Member States to develop, as soon as practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan" (Art. 53 Final Draft, emphasis added). The central review forum, the International Migration Review Forum, which was already proposed in the Zero Draft, is also respectful of state sovereignty. This Forum will succeed to the High-level Dialogue on International Migration and Development and take place every fourth session of the General Assembly "to discuss and share progress on the implementation of all aspects of the Global Compact" (Art. 49 Final Draft).

Next to the clearer emphasis on state sovereignty, the role of UN institutions has been specified, with the IOM obtaining the central coordinating role. The June Draft (Rev 3) introduced a call for the Secretary General "to establish a United Nations network on migration to ensure effective and coherent system-wide support to implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States", with the IOM serving as the coordinator and secretariat (Art. 45 Final Draft). The UN Migration Network is composed of the relevant UN organisations dealing with migration and succeeds to the Global Migration Group which has been coordinating relevant UN organisations dealing with migration since 2006. The Network and UN organisations involved will be in charge of the capacity building mechanism with its three components: the connection hub (facilitate agreements, provide trainings and run projects); the start-up fund (financing projects, technology or databases); and the knowledge platform (collecting evidence and best practices) (Art. 43 Final Draft). UN organisations will thereby support states in drafting and implementing their (voluntary) national implementation plans. Art. 45 also suggests that the Network will play an important role in the International Migration Review Forum, although the "precise modalities and organizational aspects" of the review procedure shall be specified later in 2019 (Art. 54 Final Draft). Finally, the June Draft (Rev 3) has enhanced the role of the Secretary General who is asked "drawing on the network, to report to the General Assembly on a biennial basis on the implementation of the Global Compact, the activities of the United Nations system in this regard, as well as the functioning of the institutional arrangements" (Art. 46 Final Draft).

The third aspect that has developed through the negotiation rounds concerns **cross-references to related processes** and institutions. This concerns in particular the 2030 Agenda for Sustainable Development and the Global Forum for Migration and Development (GFMD). The Agenda for Sustainable Development is referred to in a new Article on international partnerships (Art. 42 Final Draft, also referring to the Addis Ababa Action Agenda); and its migration-related aspects shall be included in the International Review Forum (Art. 49 Final Draft). The GFMD was upgraded with a specific article (Art. 51 Final Draft) referring to it as a “space for annual informal exchange on the implementation of the Global Compact” and asking it to “report the findings, best practices and innovative approaches to the International Migration Review Forum”. The GFMD was thereby singled out from the more general reference in the Zero Draft (Now Art. 52 Final Draft) to “State-led initiatives on international migration” including Regional Consultative Processes (RCPs) and the IOM International Dialogue on Migration (introduced with the first revision).

While the role of regional institutions is stressed alongside with global, national and sub-national entities throughout the text, their involvement in the operational aspects of the GCM has not become clearer in the negotiation process. Art. 41 and 47 (Final Draft) mention that implementation shall occur at the national, regional and global levels, and the new article on international partnerships (Art. 42 Final Draft) addresses implementation through regional cooperation alongside bilateral and multilateral tools. Art. 49 (Final Draft) provides that the International Migration Review Forum “shall discuss the implementation of the Global Compact at the local, national, regional and global levels, but the idea to convene a “Regional Migration Review Forum” alternating with the International Forum, which was contained in Art. 45 of the Zero Draft, was dropped. Instead, the revised Art. 50 (Final Draft) contains an open formulation according to which:

“Considering that most international migration takes place within regions, we invite relevant subregional, regional and cross-regional processes, platforms and organizations, including the United Nations Regional Economic Commissions or Regional Consultative Processes, to review the implementation of the Global Compact within the respective regions, beginning in 2020, alternating with discussions at global level at a four year interval, in order to effectively inform each edition of the International Migration Review Forum”.

Whereas earlier drafts proposed to select pertinent regional entities, the decision which **regional institutions** will be involved is left open (see also Art. 54 Final Draft). Art. 52 (Final Draft) suggests that RCPs (and other State-led initiatives such as the IOM International Dialogue on Migration) “shall contribute to the International Migration Review Forum by providing relevant data, evidence, best practices, innovative approaches and recommendations” which gives the RCPs a privileged position compared to other regional bodies like the UN Economic Commissions or regional economic communities. Given that most RCPs are administered by IOM, this choice adds to the growing influence of the organization.

Next to the regional, also the subnational level of governance is consistently referred to in the implementation and review mechanisms. The participation of stakeholders has become more precise and inclusive over the rounds of negotiations. In the first draft, “migrants” as well as “the Red Cross and Red Crescent Movement” were added to “civil society, migrant and diaspora organizations, cities and local communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions, academia, and the media” listed in the original Art. 40, now Art. 44 Final Draft. For the review process it was clarified that this would be a “State-led approach and with the participation of all relevant stakeholders” (Art. 48 Final Draft) and not a “multi-stakeholder approach” as indicated in Draft One (March).

Finally, an element from the Zero Draft that was not maintained in subsequent drafts is the idea contained in Art. 40 (Zero Draft) to “determine, in 2026, which specific measures will further strengthen the global governance of international migration, including whether to hold a review conference of the Global Compact in 2030”

## The Future

The Implementation, Review and Follow-up mechanisms are clearly intergovernmental, with the inclusion of regional and sub-regional levels of governance and the involvement of stakeholders. The strengths of this approach are its flexibility and respect for state sovereignty and different state capacities; the inclusion of capacity-building elements including funding and knowledge; the mobilisation and involvement of the different layers of governance including, next to states, local/city and regional institutions; and the greater coordination and central role of UN organisations in the UN Migration Network. There are however also some challenges that come with this approach.

Firstly, while states are the primary targets, their own review of implementation shall be “voluntary” based on national implementation plans (Art. 53 Final Draft). In contrast to similarly open governance mechanisms such as e.g. the Paris Agreement on Climate Change, there is no obligation to draft up ambitious and progressive national action plans. States will be relatively flexible to “pick and choose” from the objectives they want to work on. Apart from the intergovernmental review taking place every four years – which seems excessively distant for meaningful monitoring — no timeline or roadmap with specified deadlines is provided.

Likewise, the modalities and organisation of the International Review Forum have not been spelled out and are left for future negotiations starting in 2019 (Art. 54 Final Draft). One question is how to assure that protection of migrants’ rights receives as much attention as other state prerogatives, also given that the mandates of the Special Rapporteur on the Human Rights of Migrants or of the Special Representative for International Migration have not been strengthened.

The same is true for the funding of the capacity-building mechanism which will be influenced by the priorities of donor states.

This equally applies to the IOM which takes up a central role as coordinator of the UN Migration Framework and in the capacity-building and review mechanisms. In the absence of a normative mandate and of a solid funding basis this organisation is likely to be limited in its ambitions and capacities, the more so with the US' retreat from the GCM. Another point facing the IOM is its dual responsibility both in the implementation and the review of progress, which may cause conflicts of interest. In this context the fact that IOM does not have universal membership may also turn out to be problematic when it comes to state that are party to the GCM but not members of IOM. With regard to the monitoring, the modalities for deciding on the operationalisation of actionable commitments and on benchmarks for assessing progress will need to be specified, including the role of pertinent international organisations such as for instance the International Labour Organisation (ILO) for worker's rights.

Finally, while the Compact acknowledges that most international migration takes place within regions (Art. 50 Final Draft), the role of regional institutions has not been specified. The Final Draft emphasizes Regional Consultative Processes as primary units for regional implementation. RCPs have however a very weak institutional basis, a hitherto limited agenda frequently focused on irregular migration, and in many cases depend on the input from international actors. Other regional bodies with more developed institutional frameworks and stronger ownership such as regional economic communities could have received greater attention.



